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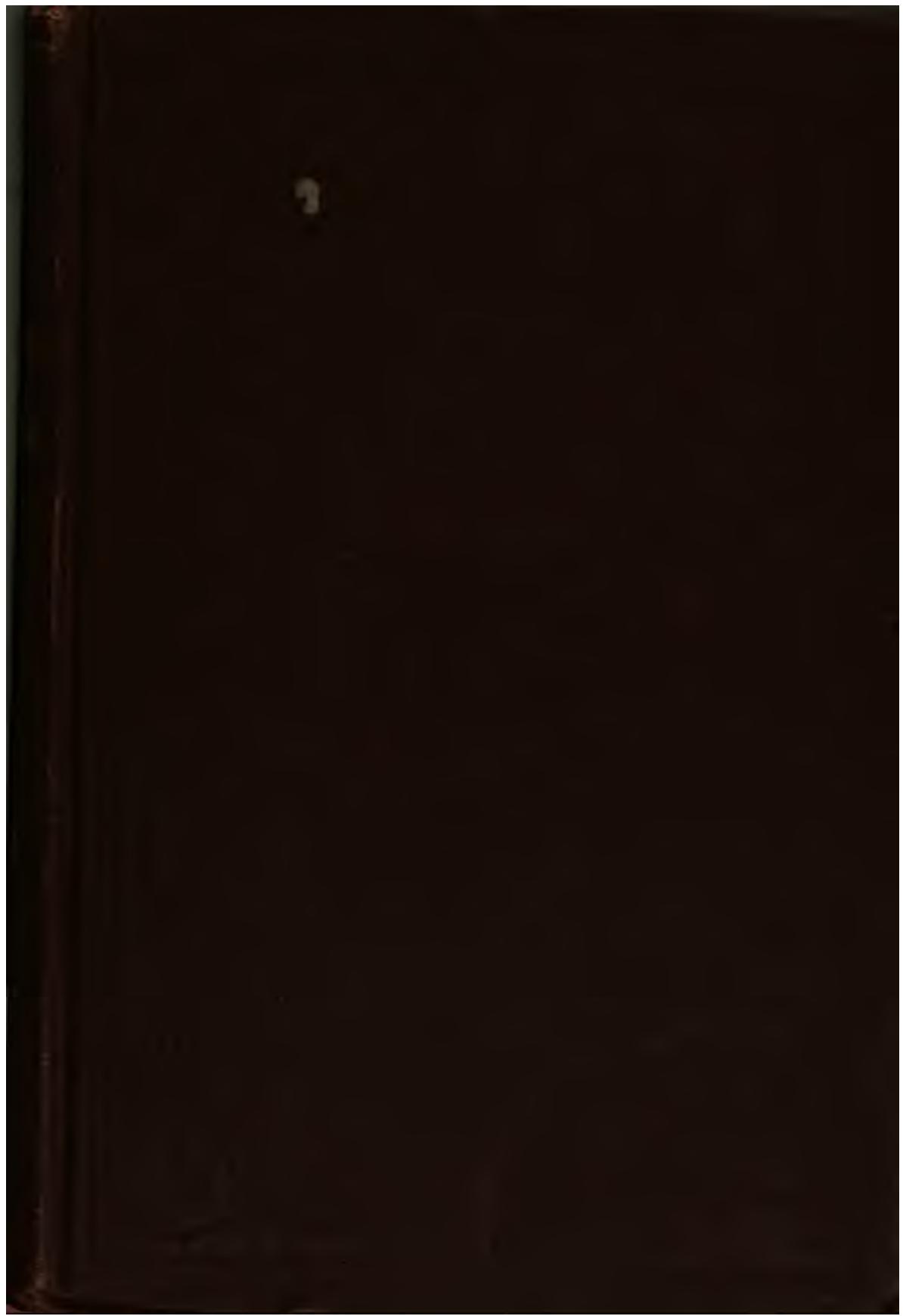
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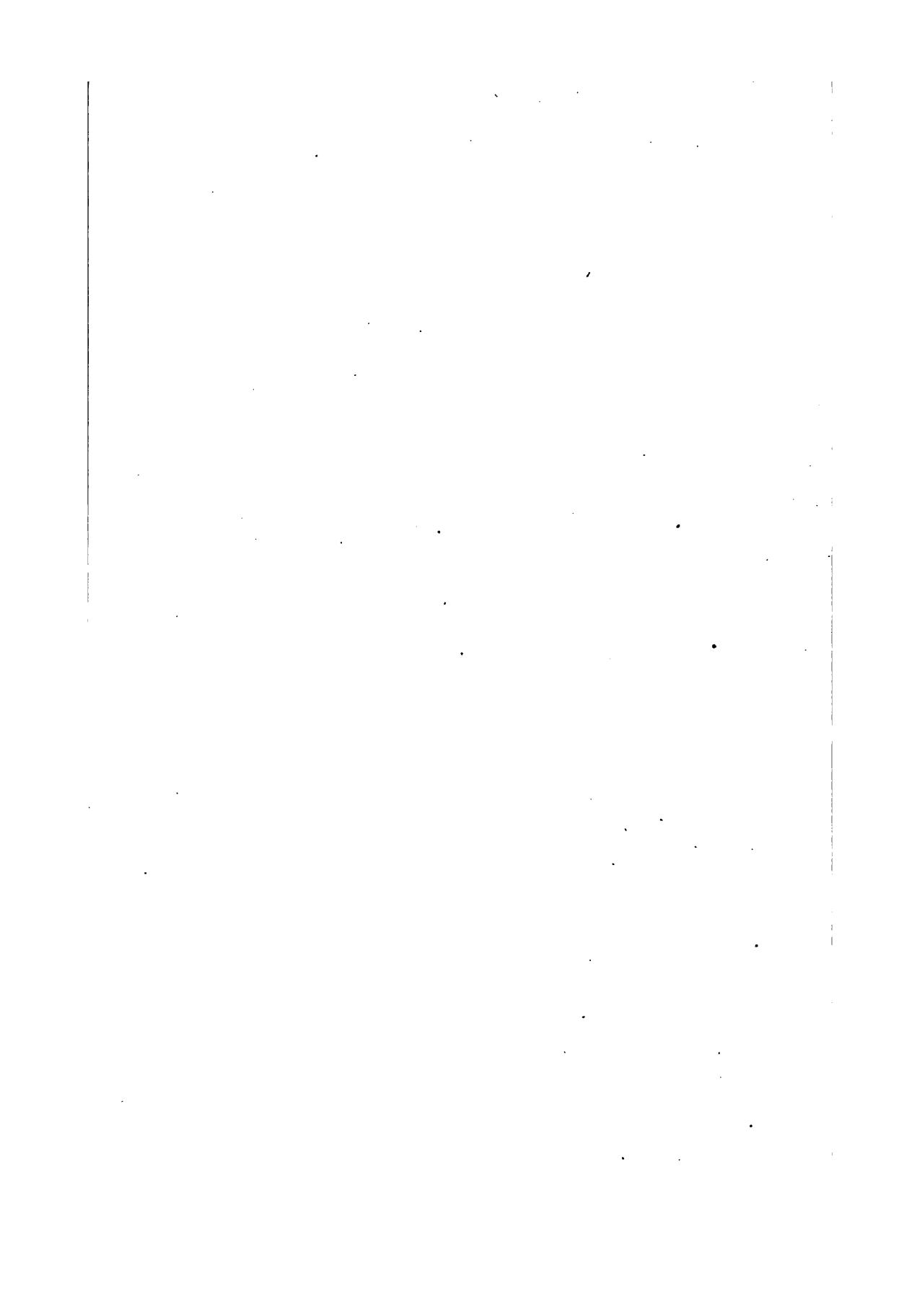
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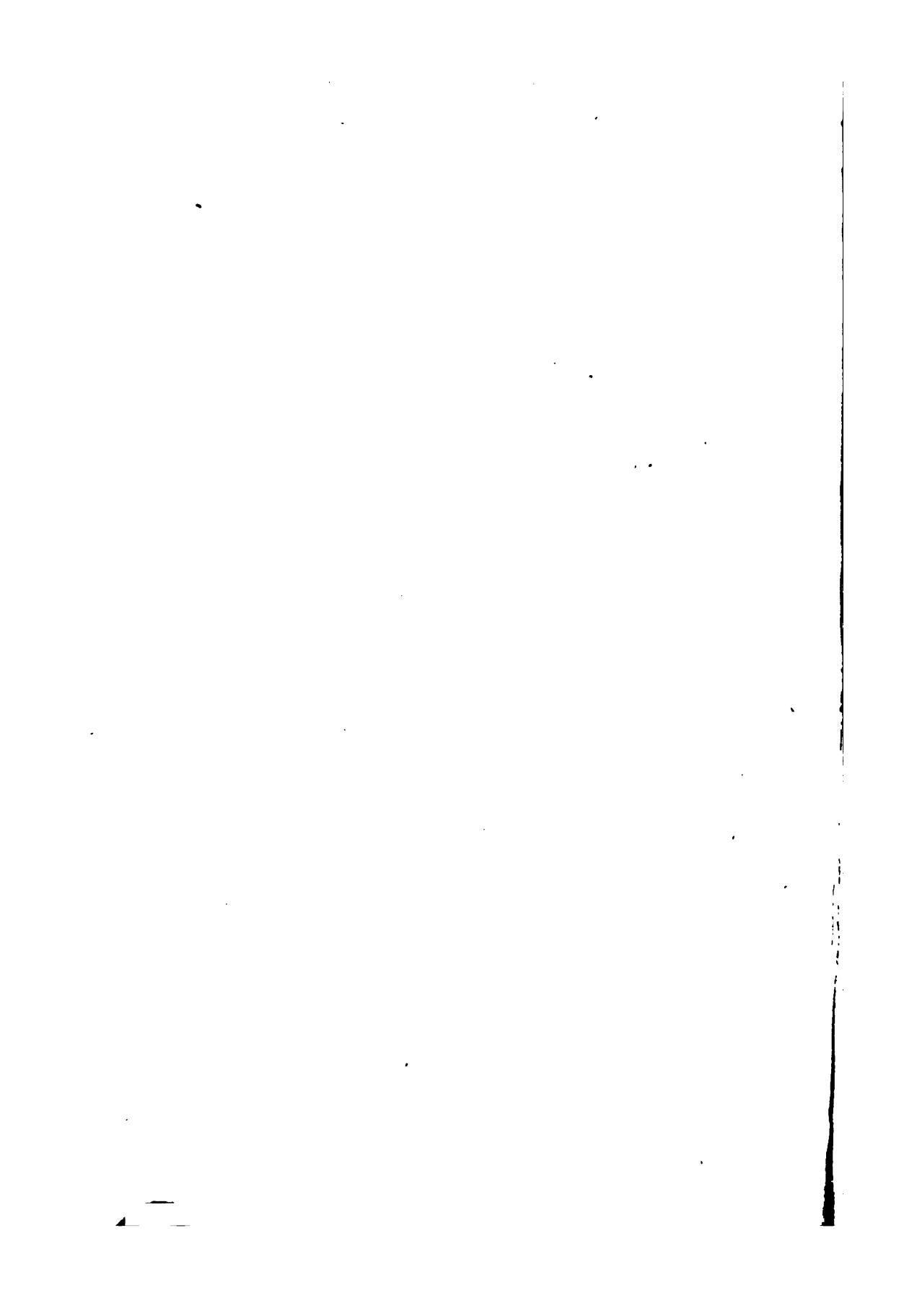








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LEADING CASES SIMPLIFIED.

A COLLECTION OF THE LEADING CASES IN

CRIMINAL LAW.

BY

JOHN D. LAWSON,

*Author of "Expert and Opinion Evidence," "Insanity as a Defence to
Crime, etc., etc.*

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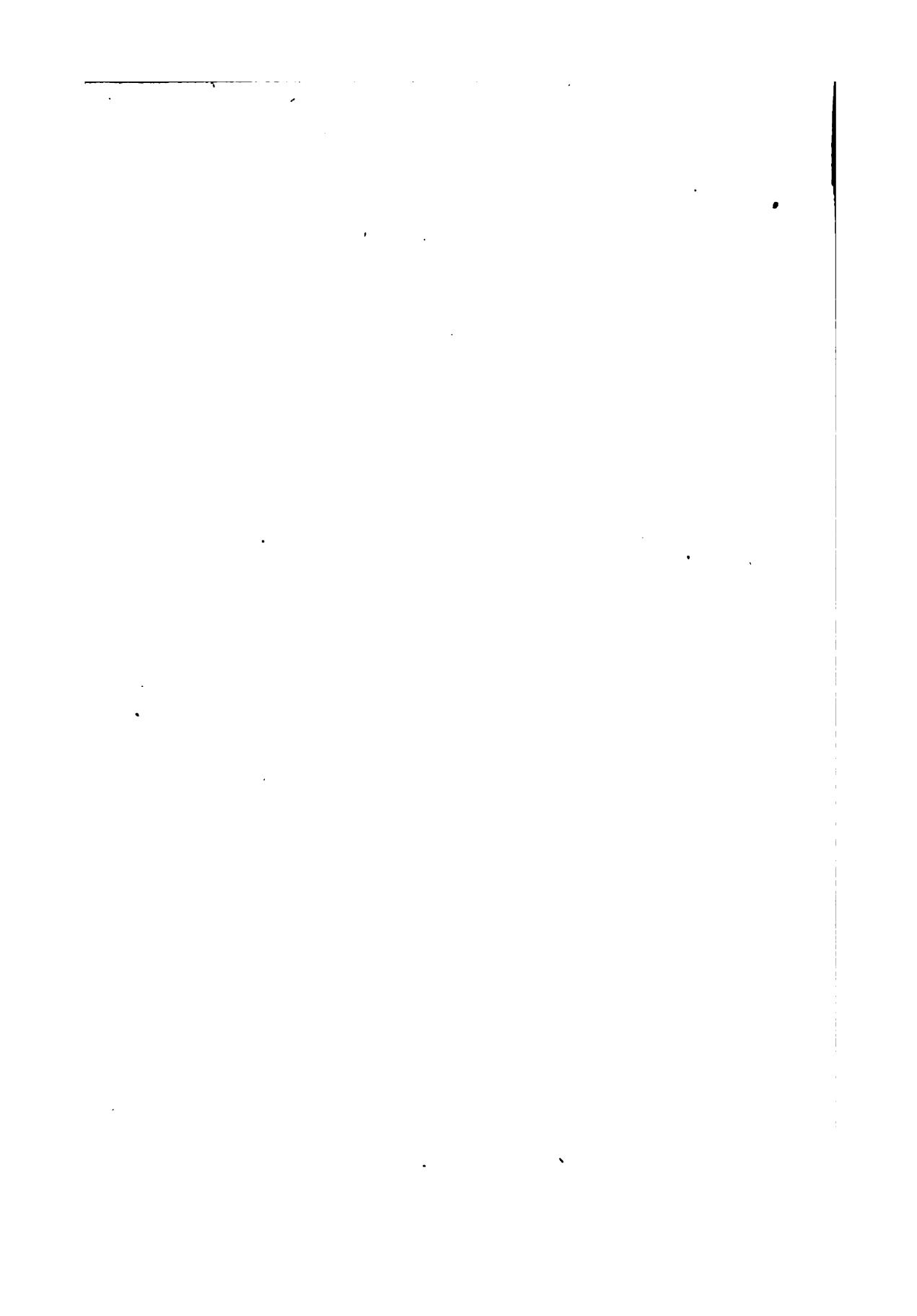
P R E F A C E.

The present volume completes the series of "Leading Cases Simplified." In my first volume (Common Law Cases) I stated my object to be to present the leading cases of the Common Law in a brief and semi-humorous form. The favor with which my attempt was received induced me, in a second volume, to treat in the same way the leading cases in Equity and Constitutional Law. And in this third volume, both the student and the practitioner will be able, I think, to find all the leading cases and all the principles of the criminal law, as administered at common law and to some extent as altered by statute.

To those (and I include the lay reader here) who are asking why it is that the punishment of crime throughout the United States has become so slow and so uncertain, I submit "My Assize Sermon to the Judges of Appeal" as containing an answer to this growing inquiry.

J. D. L.

ST. LOUIS, JUNE 1884.



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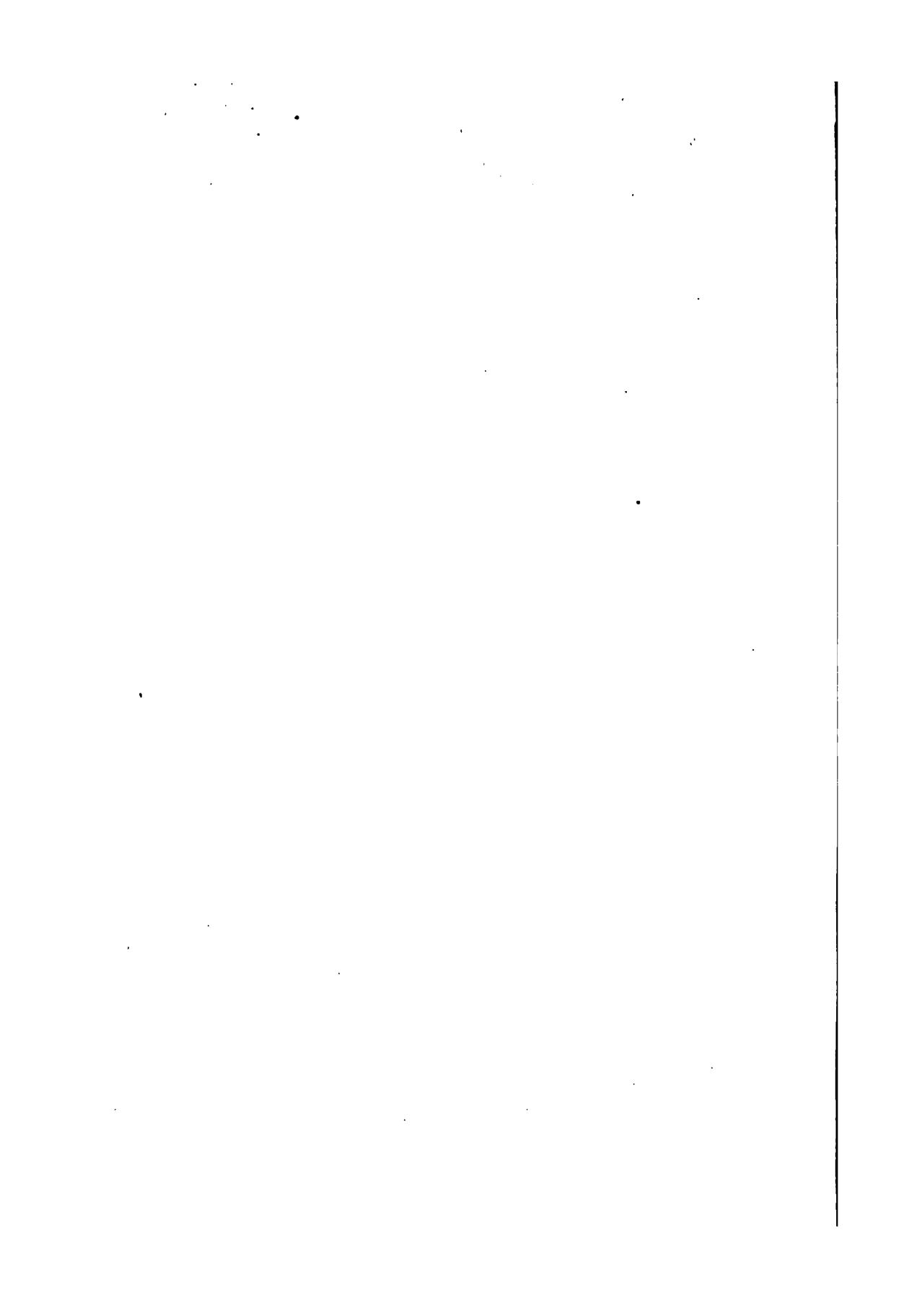


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CRIMINAL CASES SIMPLIFIED.

CHAPTER I.

THE CAPACITY TO COMMIT CRIME.

LIABILITY OF INFANTS.

REX v. YORK.

[Fost. 70; 1 Lead. Cr. Cas. 11.]

William York, a boy ten years of age, was charged with the murder of a little girl five years old. The children were orphans supported by the parish. The man of the house where they lived left them in bed when he went to work in the morning; on his return in the evening the girl was missing. Being asked where she was, the boy said that she had dressed herself and gone out. Fearing that she had fallen into a stream near by, a strict search was made and her dead body terribly mutilated found in a dung heap. The

boy at first denied everything, but afterwards confessed that he had killed her and hid her body; that the devil put him up to it.

The question arose whether so young a boy could be punished, and the court determined that he could, "there being so many circumstances in the case which are undoubtedly tokens of what is called a mischievous discretion."

An infant under seven years of age cannot commit a crime. The law presumes that he has not sufficient mental capacity for such a purpose, and although this may in some instances work an absurdity — for there may be some children more precocious at seven than others at eight years of age — yet, for the sake of convenience, the law refuses to try persons under the age of seven years, for any acts they may commit. And between the ages of seven and fourteen, the law still presumes the infant to lack discretion enough to know he is committing a crime. But here there is this difference, that the law may be shown to be mistaken. In the case of an infant under seven, a court will not listen to any evidence that he was capable; in the case of an infant over seven, but under fourteen, a court will hear proof on the subject, and, if it appears that the infant understood he was doing wrong, a court will punish him. Many instances of convictions of this kind are to be found in the books — capital convictions too, some of them. A boy named Dean, not quite nine years old, was hanged for arson in England in 1629. He was probably the youngest criminal that ever came into Jack Ketch's way. A ten year old boy called Spigund was hanged, and a thirteen year old girl, Alice de Waldborough, burned for murder. William York was not hanged; the King being in need of sailors about that time, allowed him to make himself a target for French marines. James Guild was probably the youngest criminal ever executed in the United States. He was hanged in New Jersey in 1828, for a murder committed when he was twelve years and a half old. *State v. Guild*, 5 Halst. 163; 18 Am. Dec. 404.

After attaining the age of fourteen, a person is not exempt from criminal responsibility on account of being of tender years. In the civil law it is different; there, in order to contract, a man must have attained his majority, *i.e.*, the age of twenty-one years.

In England there is one crime where the irrebuttable presumption of incapacity continues up to fourteen years of age—that crime is rape. *Reg. v. Eldershaw*, 8 C. & P. 396; *Reg. v. Phillips*, 8 C. & P. 736. But in the United States, this stands in the same category as all other crimes—if the infant is shown to have arrived at the age of puberty he may be convicted. *Williams v. State*, 14 Ohio, 222; 45 Am Dec. 536.

LIABILITY OF MARRIED WOMEN.**COMMONWEALTH v. NEAL.**

[10 Mass. 152; 6 Am. Dec. 105.]

They seem to have been a bad pair, this John and Elizabeth Neal who were indicted for assault and battery at Boston, Massachusetts, in the year of grace 1813. John was sent to prison, but Elizabeth escaped. It being proved that her husband was with her at the time, the law presumed that she had committed the crime at his command and under his coercion.

Although as we have seen (1 Lead. Cas. Simp., p. 45; 2 *Id.* 73) a married woman was not at common law at liberty to make contracts which would bind her, — she was always treated like a man when she engaged in a criminal act. *Commonwealth v. Neal* is the principal American case recognizing an old exception, *viz.* : The commission of a crime by a wife in her husband's presence. In one of the black letter books, wherein are recorded the judgments of the sages of the law, an account is given of a question propounded by the judges in the reign of the Merry Monarch: "If a man and wife go both together to commit a burglary, and both of them break a house in the night, and enter and steal goods, what offence is this in the wife? and agreed by all that it was no felony in the wife, for the wife being together with the husband in the act, the law supposeth the wife doth it by coercion of the husband." *Kelyng*, 81. Notwithstanding that at the present day and in this country, the word "obey" in the marriage service is hardly construed as strictly as it was by our great grandmothers, the *feme covert*, as the law calls the wife, is still protected by this old rule.

If her criminal act took place away from the husband's presence she is of course liable for it. Even his commands, when he is not

present, will not excuse her. *Com. v. Butler*, 1 Allen, 4. But it is to be noticed that the word "presence" in this connection has a somewhat technical meaning. If the husband is near enough for her to act under his immediate influence or control, though he is not in the same room, he is "present" in the eye of the law. Sarah Connolly went through the streets of Durham one day from house to house passing counterfeit coin. Connolly accompanied her to the door, every time, but did not go in when she did, preferring to wait on the steps for her. The judges thought that Connolly was sufficiently present to satisfy the law and Sarah was acquitted. 2 Lewin, 229.

But there may be cases where, though the husband is present, it would be so ridiculous to presume that there had been any coercion of the wife that the law will not indulge in such absurdity. One of these cases is where the wife takes such an active and leading part in the matter that it is clear that it was she and not the husband who was "running" it and that if any one was bulldozed it was the husband. *City Council v. Van Roven*, 2 McCord, 465. Henry and Elizabeth Pollard were tried for setting fire to a house. Elizabeth was Henry's wife, and he was present in the room. But it being shown that he was a cripple and in bed at the time, the woman was convicted. *Reg. v. Pollard*, 8 C. & P. 55, note.

And man and wife are often regarded by the law as "one." As it takes two or more to conspire they cannot alone be indicted for a conspiracy. *People v. Mather*, 4 Wend. 229. And for the same reason a wife cannot be convicted of stealing her husband's goods or burning his house. But they are two when it comes to personal violence; it is not "suicide," for instance, for a wife to kill her husband or *vice versa*, though I remember that this proposition was once gravely argued by a very eminent counsel in his day. So while it is a very serious offense to afford any assistance to a criminal so as to prevent his apprehension — by hiding him or giving him money to make his escape; yet a wife's duty is to do just this thing and she cannot be found guilty of harboring her husband or concealing any crime he may commit. *Reg. v. Good*, 1 C. & K. 185.

LIABILITY OF INSANE PERSONS.**M'NAUGHTEN'S CASE.**

[10 Cl. & F. 200; Laws. Insan. 150.]

On the 20th of January, Daniel McNaghten shot Edward Drummond dead with a pistol. Tried for the murder at the London Criminal Court, McNaghten was acquitted on the ground that at the time he committed the act he was insane.

The verdict of the jury created a sensation in England and aroused so much discussion *pro* and *con* that Parliament concluded to ask the opinion of the judges as to what the law really was, and the following three questions were submitted to them:—

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2. If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?

3. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any, and what, delusion at the time.

To these questions the judges gave the following answers:—

In answer to the first question they said: "He is nevertheless punishable according to the nature of the crime committed if he knew at the time of committing such crime that he was acting contrary to law."

In answer to the second question they said: "He must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

In answer to the third question they said: "Yes."

COMMONWEALTH v. ROGERS.

[7 Metc. 500; Laws. Insan. 158.]

On the 15th day of June, 1843, Rogers, who was then a convict in the State prison at Charlestown, Mass., killed the warden by stabbing him with a shoe knife. The prisoner admitted the killing, but pleaded that he was insane at the time. The homicide took place on Thursday. Commencing on Monday night previous, and continuing with increasing aggravation up to some period subsequent to the warden's death, the prisoner was laboring under some powerful hallucination; he was at times in great distress and apprehension; he declared he heard the voices of his fellow-prisoners confined in distant parts of the prison, and also some of the officers, speaking to him and threatening him with danger, telling him that poisonous substances were mingled in his food; that a fatal or dangerous game was playing upon him, which he could not long survive; that the warden was going to take him up to the old prison, shut him up, and keep him there till he was carried out feet first; that he expressed his fears and apprehensions at various times to different persons, during the three days prior to the homicide, and particularly and frequently stated that the warden was going to shut him up, and that if he did he should not live three days; he should be carried out feet first; and other statements of a like kind. His predominant fear seemed to be that he was to be shut up by the warden, and the consequence would be that he

should suffer instant death. On the afternoon of the homicide the prisoner saw the warden entering the shop where he was at work, and under the influence of his delusion, which then appeared to be at its crisis, and in full possession of his mind, he probably imagined the time had come for his imprisonment in the old prison, and his consequent death; impelled by a fear of impending danger, he rushed upon the object of his fear, and averted his own death, as he supposed, by taking the life of the warden. Several medical gentlemen and superintendents of insane asylums, some of whom had and others had not, make a personal examination of the prisoner, testified that in their opinion he was unquestionably insane.

Chief Justice Shaw laid down the law in these words (the gist of his remarks is in italics): "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. But there are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so pervaded by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, *if he has capacity and reason sufficient to enable him*

to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he stills understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If then it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state; the question will be whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

The prisoner was acquitted on the ground of insanity.

The common law refuses to punish an insane man for acts committed by him while in that condition. It is often argued that as the object of punishment of criminals is to protect society, mad-

men who commit crime should be treated like mad dogs; but the law is otherwise. It being, then, only necessary for a criminal to prove himself insane, in order to go free, the defense of insanity has become a favorite one when all other defenses and excuses have been found wanting. And it has been a difficult question for the courts to decide. "We are not physicians," exclaim the judges, "nor can we look into the person's brain, and this being so we must have a *legal test* of insanity." And what that test should be has bothered the courts not a little. Lord Hale who tried some of the first cases in which the "insanity plea" was set up, thought that if the prisoner had as much sense as an ordinary fourteen-year-old child he was a fit subject for punishment. This was called the "child test" and was followed by a good many judges, until about 1724, when Chief Justice Tracy introduced a new test. "The man who is to escape punishment for his crimes," said Chief Justice Tracy, "must be a man that is totally deprived of his understanding and memory and doth not know what he is doing no more than an infant, than a brute, or a wild beast." Arnold's Case, 16 How. St. Tr. 764. This was called the "wild beast test;" but it did not become very popular; it is easily seen that such a test would excuse very few criminals, and there were sentimentalists on the bench as well as in the kitchens. Finally, in 1840, a looney pot boy named Oxford tried to kill the Queen as she was taking a drive one summer afternoon. Lord Denman, in charging the jury, told them that the question was whether the prisoner knew the right and wrong of the act he was committing; if he did he was responsible; if he did not he was not responsible. *R. v. Oxford*, 9 C. & P. 525. This is called the "right and wrong test," and is the law of England (see *M'Naghten's Case, supra*) and of this country (see *Com. v. Rogers, supra*) at the present time.

In Illinois, Indiana, and New Hampshire, the courts say that there ought to be no legal test of insanity; that the question must simply be, was the man's insanity the cause of his committing the crime. *State v. Jones*, 5 N. H. 369; 9 Am. Rep. 242; *Hopps v. People*, 31 Ill. 385; *Bradley v. State*, 31 Ind. 492. This is substantially handing the matter over to the doctors to settle.

But it is in Kentucky where the insanity plea flourishes like a green bay tree. It has been aptly said by an English judge that there are three powerful restraints existing, all tending to the assistance of the person who is laboring under a temptation to commit a crime — the restraint of religion, the restraint of conscience, and the restraint of law. But in Kentucky, the temptation itself is

held a legal excuse, rendering the crime disipunishable, and as one of the most powerful of these restraints, viz.: that forbidding and punishing the perpetration of crime, is practically withdrawn, it is small wonder that human life is held at a discount in that State. In other words, the courts of Kentucky recognize what they call "moral insanity" as an excuse for crime, that is to say, the plea of "I couldn't help it; I had an irresistible impulse to do it," is accepted as an excuse for a criminal act. *Smith v. Com.*, 1 Duv. 224; *Kriell v. Com.*, 5 Bush, 862; *Scott v. Com.*, 4 Met. 227. If there happens to be a woman in the case, the defense becomes irresistible.

It is needless to say that such a doctrine has no place in the common law of England or in the jurisprudence of all those States where the "right and wrong test" prevails. "The law," said Alderson, B., in *R. v. Pate*, 1 Lead. Cas. Cr. 104; "does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware it was a wrong act he was about to commit. A man might say he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it." And so said the Supreme Court of North Carolina, where an astute counsel attempted to clear his client on the "moral insanity" theory. "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue,' proceeds from a perverse will brought about by the seductions of the evil one, but which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deem themselves incapable of exerting strength of will sufficient to arrest their rule,—speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. To excuse one from criminal responsibility the mind must, in the language of the judge below, be insane. The accused should be in such a state from mental disease as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and with a restricted application to the act then about to be committed, is approved by the highest

authorities. * * * If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment." State *v.* Brandon, 8 Jones (L.) 463. And in a Michigan case, Campbell, C. J., had this to say: "Unfortunately for the administration of justice, persons are sometimes found, who with small experience and large conceit, have succeeded in formulating theories under which, if properly applied, there would be hardly enough sane persons found to sit upon juries or attend to business. If the term insanity, — which it may be remarked is not a term of the law at all, — is so far enlarged as to include persons who have not only knowledge of wrong, but also capacity to resist it, then it includes persons whom the law deems capable of crime, and is a phrase entirely inapplicable in civil or criminal law. There is some reason to suppose, from the frame of this record, that what the respondent relied on as 'temporary or emotional insanity' was that convenient form of it which enables a person who does not choose to bridle his passion, to allow it to get and keep the upper hand just long enough to commit an act of violence, and then subside. We had occasion to refer somewhat to this subject in Welch *v.* Ware (82 Mich. 77), and we adhere to the views there expressed, that if a person voluntarily allows his passion to be indulged until it gets the temporary control over him, he is responsible for the condition in which he thus falls, as a man who becomes voluntarily intoxicated is liable for his drunken violence. It is certainly a strange and unsafe doctrine to tolerate that anything should be deemed innocent insanity which in no way affects the mind or conduct except on the one occasion when it is kindled by temporary anger, and subsides with the gratification of that malignant passion." People *v.* Finley, 88 Mich. 482. And to the same effect are the remarks of the Supreme Court of Alabama: "There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called 'irresistible impulse,' 'moral insanity,' and *perhaps* by some other names. If, by these terms, it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called 'moral,' or 'emotional insanity,' savors too much of a seared conscience, or atrocious wickedness, to be entertained as a legal defense. * * * We concur with Mr. Wharton, that moral in-

sanity, which consists of irresistible impulse, co-existing with mental sanity, 'has no support either in psychology or law.'" *Boswell v. State*, 68 Ala. 807.

I think I have quoted enough to show how this defense of "un-controllable impulse" is belabored by the courts, East, West, North and South. The assassin Guiteau was one of the latest criminals to try this dodge. He was unsuccessful, of course; and I recommend to the student of the law on this subject the justly admired charge of Judge Cox on this celebrated trial. *U. S. v. Guiteau*, 10 Fed. Rep. 161; *Laws. Insan.* 163.

*LIABILITY OF INTOXICATED PERSONS.***PEOPLE v. ROGERS.**

[16 N. Y. 9; Laws. Insan. 624.]

James Rogers and two boon companions, after filling themselves with beer at a corner saloon in New York City, swaggered and staggered along the sidewalk on their way home. Returning from market (it was about ten o'clock P. M.) were John Swanston and wife, and them the revelers met. Rogers ran against the female, pushing her against her husband. The husband remonstrated, some high words followed, but the three passed on. Presently Rogers turned back, came up to Swanston and stabbed him in the breast with a dirk-knife, and then ran home, where he arrived so drunk that he could not walk, but fell on the floor, and had to be undressed and put to bed by his mother and sister.

Swanston died, and Rogers was indicted for his murder. He pleaded his intoxication, but the judges refused to listen to such a plea. "In the forum of conscience," said Denio, J., "there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the main-

tenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-man and to society, to say nothing of the more solemn obligation, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society."

And so Rogers had to pay the penalty of his crime as though he had been sober.

UNITED STATES v. DREW.

[5 Mason, 28; Laws. Insan. 601.]

Master Drew, of the American ship John Jay, when he stopped his grog got the jim-jams. This is not the rule with sailors, but Drew was a harder drinker than most seamen. For the first few days of one voyage he drank almost without intermission; then he swore a big oath that he would be a temperance man. Not satisfied with this, he had all the liquor on the ship thrown overboard. But this sudden change resulted badly. The liquor was no sooner beyond his reach than he began to betray great restlessness, uneasiness,

fretfulness and irritability, — expressed his fears that the crew intended to murder him, and complained of persons, who were unseen, talking to him and urging him to kill the mate. He could not sleep, but was in almost constant motion during the day and night. While in this state he killed the mate. The night before the act he was more restless than usual, seemed to be in great fear, and said that whenever he laid down there were persons threatening to kill him if he did not kill the mate. In short, he exhibited all the marked symptoms of *delirium tremens*. Being put on trial for the murder of the mate, his counsel relied on the effects of the drunkenness. The government replied that voluntary drunkenness was no defense to a crime. But Judge Story, while admitting that this was so, said that insanity resulting from drunkenness stood on a different footing, and Drew must be acquitted.

The judgment of the learned judge was brief, but contains a complete statement of the law of such cases. "The question made at the bar," said he, "is whether insanity, whose remote cause is habitual drunkenness, is or is not an excuse in a court of law for a homicide committed by the party while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross

vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts*; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to have been convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party,—as, from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.”

PIRTLE v. STATE.

[9 Humph. 668; Laws. Insan. 645.]

A statute of Tennessee provided that all murder committed “willfully, deliberately, maliciously and

premeditatedly" should be murder in the first degree, and all other kinds of murder should be murder in the second degree. This statute being in force, Pirtle killed a man and was indicted for murder in the first degree.

Now, Pirtle was drunk at the time, and the question was whether he could plead such an excuse at all. The court decided that he could. The statute, it said, drew a distinction unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by confinement in the penitentiary. In order to inflict the punishment of death, the murder must have been committed willfully, deliberately, maliciously and premeditatedly; and therefore whatever fact was calculated to cast light upon the mental *status* of the offender was legitimate proof; and, among others, the fact that he was at the time drunk, not that this would excuse or mitigate the offense if it were done willfully, deliberately, maliciously and premeditatedly (which it might well be, though the perpetrator was drunk at the time); but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse passion and heat to the point of taking life, without premeditation and deliberation.

It is an old principle of the common law that voluntary drunkenness does not excuse a crime committed while intoxicated. Hear the sages: —

Lord Hale, in his History of the Pleas of the Crown (p. 82), says: "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of reason, and puts many men into a perfect but temporary frenzy; but by the

laws of England, such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." Lord Coke, in his first Institute (p. 247), says: "As for a drunkard, he is *voluntarius demon*, he hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness does aggravate it." Hawkins, in his Pleas of the Crown, says: "He who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober." Blackstone, in the fourth book of his Commentaries, says: "As to artificial voluntarily contracted madness, by drunkenness or intoxication, which deprives men of their reason and puts them into a temporary frenzy, our law looks upon this as an aggravation of the offense, rather than an excuse for any criminal behavior. The law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another." And the law of America and England has not changed since Hale, Coke, Hawkins and Blackstone lived and wrote. (Laws. Insan. 727, 747.) But to this rule, as to all other rules, there are several exceptions,—in all four as follows:—

1. *Where the drunkenness has produced insanity.* U. S. v. Drew, *ante*, p. 16, illustrates this exception.
2. *Where by statute a crime is divided into degrees.* Pirtle v. State, *ante*, p. 18, illustrates this exception.
3. *Where intent or knowledge is essential to constitute the crime.*—A man is charged with larceny—taking goods not his own with the intention of stealing them. Here, if it can be shown that when he took the goods he was so drunk as to be unable to form an intent to steal, he must be acquitted. Wood v. State, 34 Ark. 341. In a case of this kind the court said: "Drunkenness certainly does not excuse or palliate any offenses. But it may produce a state of mind in which the accused would be totally incapable of entertaining or forming the positive and particular intent requisite to make out the offense. In such a case, the accused is entitled to an acquittal of the felony, not because of his drunkenness, but because he was in a state of mind resulting from drunkenness, which affords a negation of one of the facts necessary to his conviction. If, at the time of taking property a person is so under the influence of intoxicating liquor that he is unable to form a felonious intent, he cannot be guilty of larceny." Mr. Bell, of Des Moines, Iowa, helped to settle the law on this point. On

New Year's eve he determined to see the old year out and the new year in. He took too many smiles, however, for when the bells "rang out to the wild sky," this one Bell was asleep in another man's house, into which he had walked. Going into other people's houses at midnight is against the law, and at the end of Mr. Bell's little spree he found himself charged with burglary. But the court said that as he blundered into the house through drunkenness, without knowing where he was and with no intent to steal or commit any crime there, he could not be found guilty. *State v. Bell*, 29 Iowa, 316; *Laws. Insan.*, 682.

4. *Where the intoxication is involuntary.*—A man by fraud or force makes B. drunk. B. is not responsible for his acts committed under its influence. And so, if C., by the advice of a physician or intending to benefit his health or alleviate some pain, should drink more than he intended.

*LIABILITY OF PRINCIPALS FOR ACTS OF
AGENTS.*

HIPP v. STATE.

[5 Blackf. 143; 38 Am. Dec. 463.]

It was against the law in Indiana, in the year 1839, for any one to sell liquor to an intoxicated person. Mr. Hipp kept a hotel, and one day his bar-keeper sold half a pint of whiskey to a man in exactly the condition which the statute described. For this Mr. Hipp was indicted. But he was not convicted. "The landlord," said the court, "was not liable to an indictment for the act of his bar-keeper. If the defendant had commanded the offense to be committed, or had been present when it was committed, without making any objection to it, the act would have been his own and the indictment could have been sustained."

The rule in *civil cases* is that the master is liable for the acts of his servant whenever he is acting in the course of his employment. But to make the master liable criminally something more is needed—he must either participate actually in the act of the agent or he must so far assent to it as to be morally guilty.

The cases in this connection are of three kinds:—

1. *Where the agent acts by the command of the principal.* In this case there never was or is any doubt but that the principal is guilty.

2. *Where the agent is acting within the scope of his general authority.* Thus, a man who keeps a grocery store has a clerk in his shop, who

sells liquor to a customer, without a license. *Prima facie* it being proved that the liquor was owned by the grocery keeper, he is responsible for his clerk's act. *Com. v. Nichols*, 10 Metc. 259.

3. *Where the agent acts without his consent express or implied, or against his orders.* Here the master is not liable of course. A coal dealer in Burlington, Vermont, sent his man to deliver some coal to a customer; the man, for convenience of unloading and to lessen the distance drove on the sidewalk. As it was a misdemeanor there to drive a horse on the sidewalk, the coal dealer was indicted. But the court held that he was not liable for his man's act. "It is evident," they said, "that he had no reason to suppose that any such act would be done. *State v. Bacon*, 40 Vt. 456.

But the *agent or servant* is criminally responsible in all these cases.

LIABILITY OF AGENTS OR SERVANTS.**HAYS v. STATE.**

[18 Mo. 246.]

Robert Hays, being indicted for selling liquor without a license, pleaded that he was only the servant of the proprietor, and sold the liquors at his order, and for his profit. But the court said that this made no difference. "Whoever being of legal discretion acts wrongfully," quoth the judge, "is personally responsible, and the fact that it was done as the agent or by the request or command of a third person is no excuse."

An agent or servant is not exempt from punishment for crime because he acted under the command of his superior, and for his benefit. The agent may, however, escape punishment when it appears—

1. *That he acted innocently.* In an English case, the proprietor of a mine put his servants to work in the direction of an adjoining mine, belonging to another. The servants, after a time, got beyond the boundary of their mine and commenced taking the coal from the next mine, the master knowing that they had encroached, but the servants thinking that it all belonged to the master. It was held that the master was guilty of larceny but that the servants were not. *Reg. v. Bleasdale*, 2 C. & K. 765. There was a Hoss and hog case of this kind in Missouri. Hoss coveted his neighbor's hogs which were running around loose in the woods. So he hired a man to catch them, bring them to his barn and mark them. The man, while engaged in the work, was caught himself and taken to the lock-up. But the court held that if the man thought the hogs belonged to Hoss he was not guilty. *State v. Matthews*, 20 Mo. 55.

But the act must be one not wrong in itself. If a master told his servant to shoot a man, the servant would be bound to know that it was an order he ought not to obey and would be guilty if he did.

2. *That he acted under duress.* See *post*, p. 60

LIABILITY OF CORPORATIONS.

REG. v. BIRMINGHAM AND GLOUCESTER RAILWAY CO.

[8 Q. B. 228; 1 Lead. Cr. Cas. 158.]

Proceeding by authority of the statute, the justices of Worcester ordered the Birmingham and Gloucester Railway Company to build certain bridges over their tracks. The company refused to do so, and, being brought into court for disobedience, objected that no indictment would lie against a corporation. But the court did not agree with this argument, and the railway company was tried, found guilty, and fined.

REG. v. GREAT NORTH OF ENGLAND RAILWAY CO.

[9 Q. B. 815; 1 Lead. Cr. Cas. 166.]

It is not an uncommon thing for a railroad corporation to act as though it owned the world. The Great North of England Railroad Company had obtained no authority to cross with its tracks a street in the village of Hurworth; but what did that matter? It suited its convenience to do so, and that was enough. So it

set its workmen at the road and cut a way through it, and built a wall and laid its tracks, and intimated to the citizens that if they did not like it they could lump it. But they were a public-spirited people, the villagers of Hurworth, and in short order had the company indicted for nuisance. Then, as is their custom, the corporation unlocked its money chest and employed the best legal talent to beat its opponents. No less than three big-wigs argued with great earnestness and at great length that the prosecution was preposterous. When the court referred them to the Birmingham Railway Case, they replied that there the company was indicted for not doing something, while here it was indicted for doing something; that the former was all right, but the latter all wrong. But the court thought the distinction rather transparent. "Why," said Lord Denman, C. J., "should a corporation be liable for one species of offense and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments, but there is none here. It is as easy to charge one person or a body corporate with erecting a bar across a public road, as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the nuisance."

Then the three big-wigs advanced another argument. "You can indict the man that gave the order" ("if you ever find him out," they whispered to each other); "or, better still, you can indict the men that dug the earth up and laid the rails and hammered the ties" ("send them to jail if you like; low workmen are nothing to us," they whispered again and chuckled),

" so there is no necessity for laying your hands on Us," with a very big U. But again Lord Denman shook his head. "The public," said he, "knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it,—that is, the corporation, acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

Corporations have led the courts a hard race. In the early history of our law, a corporation being a rather uncommon creature, the judges found a good many reasons for not treating them as individuals were treated, because they had few of the attributes and powers of individuals. It was argued that as they were not authorized to do anything but certain legal acts, if they did anything illegal the act was beyond the authority of the hand or agent which did it, and being unauthorized it ought not to bind the principal. The courts at first assented to this argument, but such has been the growth of these concerns that public policy has compelled a change in this respect. "The old rule," said Bigelow, J., in a Massachusetts case, "had its origin at a time when corporations were few in number, and limited in their powers and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations and assimilate them, as far as possible, in their legal duties and responsibilities to individuals." *Com. v. Proprietors*, 2 Gray, 345.

The old rule that a corporation could not be held on a contract not under its corporate seal; that it could not be liable for a trespass, a malicious prosecution, or a libel in a civil action, is now completely exploded, and it is well that it is so.

The two cases above lay down the modern view of the law that a corporation may be liable criminally as well; both for *non-feasance*

i.e., not doing what it ought to do, and *misfeasance*, *i.e.*, doing what it ought not to do. The distinction that the three big-wigs tried to make when they were arguing before Lord DENMAN, was a very subtle one. And if they had succeeded they would have been able to whip the devil round a post in grand style. Indicted, for instance, for not building a proper bridge, they would have replied that their offense was building an improper bridge, and not indictable. And in a case like *Com. v. Proprietors*, where a corporation was indicted for nuisance in not constructing any draws in a bridge over a river, they would have argued that they were guilty of a *misfeasance*, *i.e.*, obstructing navigation in the river, and were not liable.

But it is still the law that corporations are not indictable for offenses which require criminal intention to make them crimes, or which consist of a violation of those social duties which men are charged with. Thus treason, murder, perjury, or such offenses, they cannot be guilty of.

CHAPTER II.

GENERAL PRINCIPLES OF CRIMINAL LAW.

ELEMENTS OF CRIME — PUBLIC GRIEVANCE.

REX. v. WHEATLY.

[2 Burr. 1125; 1 W. Bl. 278; 1 Lead. Cr. Cas. 1.]

When Richard Webb, of the parish of St. Luke, in the county of Middlesex, paid for a thing he was accustomed to get it, and when he paid for a gallon of beer he expected to get a gallon of beer. So when, having ordered of Mr. Brewer Wheatly, eighteen gallons of that foamy beverage the barrels came, he paid for eighteen gallons. When it subsequently turned out that the barrels held only sixteen gallons, Richard Webb was wroth and tried to have the brewer sent to prison for cheating him.

However, he did not succeed, for the court told him that his loss arose from his carelessness in not measur-

ing the beer before he paid for it. "The offense that is indictable," said Lord Mansfield, "must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all, or many of his customers, or uses them in the general course of his dealing; so if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So if there be a conspiracy to cheat; for ordinary care and caution is no guard against this. Those cases are much worse than mere private injuries; they are public offenses. But here it is a mere private imposition or deception; no false weights or measures are used, no false token is given, no conspiracy; only an imposition upon the person he was dealing with in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of his contract, for which non-performance he may bring his action. The selling an unsound horse as and for a sound one is not indictable; the buyer should be more upon his guard." And all the other judges concurred with him, Mr. Justice Wilmot being especially positive, saying: "The matter has been fully settled and established, and upon a reasonable foot. The true distinctions that ought to be attended to in all cases of this kind and which will solve them all, is this:—that in such impositions or deceits where common prudence may guard persons against the suffering from them, the offense is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him; but where false weights and measures are used, or false tokens produced, or such methods

taken to cheat or deceive as people cannot by any ordinary care or prudence be guarded against, there is an indictable offense."

In a popular sense a "crime" means a degrading and immoral act. But in the law there are very many degrading and immoral acts, which are not crimes; and there are very many "crimes," which are neither degrading nor immoral. The only definite meaning which a lawyer can attach to the word "crime" is an act or omission which the law notices and punishes. It is not at all necessary that the act should be immoral or bad in itself. Philosophers have pointed out the absurdity of an act being right on one side of a river and a crime on the other. Yet so it may be. "When English law," says Stephen, "prevailed within the Indian Presidency towns and not in other parts of India, it would have been true to say that Suttee was or was not murder, according as it was or was not carried on within the Mahratta ditch. In the same way it was morally right according to Hindoo views and morally wrong according to English views." What is "criminal" (using this word in the legal sense) in one jurisdiction is not criminal in another, and what is criminal to-day may not have been criminal yesterday, and may not be criminal to-morrow. In one country the law punishes Sabbath breaking; in another, the first day of the week is regarded as a day for festivity and amusement. To manufacture or sell intoxicating liquor may be innocent in one State, and criminal in another. Embezzlement was regarded as a mere breach of trust for many years; but becoming alarmingly frequent was made by statute a crime. The patriarchs of the Bible were good men, but if they lived in our generation and indulged in the marital practices which are recorded of them, they would spend most of their days in the penitentiary.

Even acts which savor of immorality or vice are not always "crimes." Seduction and adultery, though acts of immorality, are not crimes in England, nor in some of the States. The law of the United States, or of any other country, never punished a man "for ingratitude, for hardheartedness, for the absence of natural affection, for idleness, for avarice, sensuality, pride," or vices of this character. "Sinful thoughts and dispositions of mind might be the subject of confession and penance," but they are never punished by the law.

Therefore the best definition of crime in a legal sense that can be given is this: "An act forbidden by the State under pain of punishment."

At common law an act to constitute a crime must do an injury to the public. An infringement of private rights the law does not punish but leaves the parties to adjust their differences and obtain satisfaction in a civil action. An injury from a breach of a contract is not a crime in the person causing the injury, nor is an injury caused by fraud *unless the fraud was such as tended to injure the public.*

Rex *v.* Wheatly, illustrates this distinction. In another old case (Rex *v.* Jones, 1 Salk. 379), the prisoner came to A. pretending that he was sent by B. to receive twenty pounds. A. gave him the money, but it turned out that B. had never sent him. Being indicted for the cheat, the court said: "It is not indictable unless he came with false tokens. We are not to indict one man for making a fool of another. Let him bring his action." But if his cheat was by false tokens, the use of which would take in the public generally, and not simply a single individual, the sharper found himself in a box. Martin Stroll strolled one night into a store in Charleston, S. C., and bought from a clerk two shirts and a scarf—price \$3.50. He paid him with a five dollar bank-bill which he knew to be worthless. It was held that Martin was indictable. "The false token," said Richardson, J., "must have the ostensible appearance of a public instrument calculated to deceive. The common illustrations of the meaning of the common law in such cases are found in adjudged cases of cheating by means of false measures, as the bushel, gallon, or yard. A false seal affixed to cloth, in order to enhance the price; cheating by false dice is referred to the same general principle. So false certificates or vouchers by an officer, or false copies or certificates of judicial records. In a word, the cheat or fraud must be effected by some deceitful and illegal practice or token which affects or may affect the public. The same cheat, effected by means of the promissory note of an individual would not be sufficient, as this court decided in the case of State *v.* Middleton, Dudl. 275. Is a bank-note to be placed on the same footing? By no means. To cheat by the mere semblance of a bank-bill is calculated to affect, and would greatly affect, the general interest and safety of trade, more so assuredly than by cheating by false dice or counterfeit public seals in cloth or inspected tobacco, which would be clear cases." State *v.* Stroll, 1 Bich. 224.

But it should be added that many of the frauds which were not indictable at common law are now punishable by statute. Examples of these will be found further on, where the subject of false pretenses is considered.

ACTS OF OMISSION DO NOT AMOUNT TO CRIMES.

REX v. SMITH.

[2 C. & P. 447.]

This Smith family was surely descended in a direct line from Cain, the first. William, Thomas, George, and Sarah Smith, brothers and sister, lived together in the same house, which had been left them by their father. George was forty years old, and an idiot, and the others, after the father's decease, left him to shift for himself in a dark room without food, clothing, or warmth. It is painful to relate that the law found itself unable to punish them. "How can I tell the jury," said the judge, "that either of the defendants had such a care of this unfortunate man as to make him criminally liable for omitting to attend to him. There is strong proof that there was some negligence, but my point is that omission without a duty will not create an indictable offense."

And if the idiot had died of the neglect, the result would have been exactly the same.

To *not* do an act, even though the consequence of such omission is an injury to another, is not (except as hereafter stated) a punishable crime. One may see another struggling in the water; a rope thrown to him, or a hand held out, may save him; but he may refuse to throw the rope which is at his feet, or he may turn his head and refuse his hand, and the struggling man may be drowned.

Yet the law does not charge him with his murder. Or A. may see a person about to cross a river which is ordinarily fordable. But the river has been swollen during the night, which the traveler does not know, but A. does. By A. failing to warn him, the traveler walks into the river and is drowned. But A. is not criminally responsible for the traveler's death. Lord Macaulay (who was a great jurist as well as a great historian and whose Indian code is worthy of careful study at the present day) says on this subject: "It will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die. * * * If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man, just one degree above beggary, also to be a murderer if he omits to invite the beggar to partake of his hard earned rice. Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A. to be fully convinced that nothing can save Z's life, unless Z. leave Bengal and reside a year at the Cape; is A., however wealthy he may be, to be punished as a murderer, because he will not, at his own expense, send Z. to the Cape? Surely not. Yet it can be difficult to say on what principle we can punish A. for not spending an anna to save B.'s life, and leave him unpunished for not spending a thousand rupees to save Z.'s life. The distinction between a legal and an illegal omission is perfectly plain and intelligible, but the distinction between a large and a small sum of money is very far from being so, not to say that a sum which is small to one man is large to another. The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man, where are we stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveler against a

swollen river? Is he to be a murderer if he does not go a hundred yards? if he does not go a mile? if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveler as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger who will not run a mile to save a man's life, is very far from being equally clear."

One other illustration will suffice. A pedestrian crossing a railway track sees a train crowded with passengers approaching; he sees, too, that the switch is open and the switchman asleep. By stepping aside one yard, he can close the switch, which is unlocked or awaken the switchman. He does neither, but passes on to watch, with a fiendish delight, the destruction of scores of human beings. Yet, though his fellow-men would rightly regard him as a monster, the law would not punish him as a criminal.

The reason of this is that the law goes on the maxim "attend to your own business." If every person, by fear of a criminal prosecution, were to feel called upon to put everything right in this world that they see going wrong, confusion would soon reign everywhere. "Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer-by was compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed." Whart. on Hom., sect. 80.

A case very like the principal case was that of *Reg. v. Shepherd*, 9 Cox C. C. 123. Mrs. Shepherd's daughter Mary, who lived in another town and earned her living making gloves, came home one day to be confined. The mother carried her indignation at the fix the girl had got herself into so far as to refuse to call in a mid-wife, or give her any attention at all. Poor Mary, unable to do anything for herself, died of sheer neglect. Yet it was held by all the judges that the mother was not punishable. "In this case," said Earle, C. J., "the relation is that of a parent and daughter, beyond the age by which a duty is cast by the statute to maintain and support her, the daughter being entirely emancipated." "I put my judgment," said Wightman, J., "on the ground that the circumstances stated do not show any legal duty to do that for the omission of which the prisoner was charged." And Williams, J.,

added: "I am of the same opinion. No doubt, morally speaking, the prisoner has been guilty of a shocking crime, but not of a legal one." The two other judges of the court had to agree to this.

But when it is a man's business either by law or contract to do a certain thing, the omission to do that thing may involve him in criminal liability — the law tries to compel a man to "attend to his business." The next cases illustrate this exception.

UNLESS THERE IS A LEGAL DUTY TO PERFORM THEM.

QUEEN v. HUGHES.

[26 L. J. M. C. 202.]

Some contractors were building a wall on the inside of the shaft of a coal mine. Hughes was employed to put a stage on the top of the shaft in order to prevent trucks loaded with coal from falling down it. One morning while the work was going on Hughes omitted to put on the stage, and in consequence a truck finding nothing to bar its way made a rather hurried descent to the foot of the shaft, and killed several of the men working there. Hughes was convicted, it being held that his position was exactly the same as if he had pushed the truck down the shaft.

REG. v. CONDE.

[10 Cox, C. C. 547.]

Examined in the Central Criminal Court in April, 1867, Jane Tucker gave this picture of the Conde household: "I live right opposite the Conde's house on the first floor. I could see plainly into the room where they lived. I never saw Willie eating. I have

seen him standing against the wall all day ; on other occasions for two or three hours at a time. When his mother went out of the room he would sit down on something ; but as soon as he heard her coming he would jump up and resume his position at the wall. He used to stand at the wall whilst the rest of the family had their meals. The other children were playing about with something in their hands to eat, or else standing at the table with their mother. I have never seen any food given to Willie. I have observed this for nine months as near as I can recollect." One day Willie died, and the coroner said it was starvation. The prisoner, his mother, was then indicted for manslaughter, and found guilty.

The law made it her duty to supply her child with necessaries, and for the result of this omission she was criminally responsible.

In the first case the duty was cast upon Hughes by his own actor contract. In the second case the duty was cast on the mother by the law—the duty of a parent to supply an infant child with necessaries. Many cases of this kind are to be found in the law books.

One Pargeter was employed on a railroad, and it was his duty to give a certain signal when the line was obstructed. But one day, though he saw the line obstructed, he gave no signal, and a train came along with fatal results, several persons being killed. Pargeter was convicted of manslaughter. *R. v. Pargeter*, 8 Cox C. C. 191. Elizabeth Bubb was a widow with two children, and the sister of the wife of Richard Hook. His wife having died he went to live with his sister-in-law, taking his child Maria with him, and paying Elizabeth his and his child's board. Richard was a working man and only able to get home once a week. Having a curious antipathy to the child, Elizabeth gave it no food or clothing when the father was absent and from this neglect it died. It was held that she was guilty of murder or manslaughter, according as she had intended or not intended its death. *Reg. v. Bubb*, 4 Cox C. C. 455. While there was no legal duty in the first instance for the aunt to provide

food for the niece, yet she had, by accepting its charge and receiving compensation, placed herself in the same position as though she had been its parent.

The principles of the cases we have just considered are tersely summed up by Lord Macaulay in his report on the India Code, as follows:—

“A. omits to give Z. food and by that omission voluntarily causes Z.’s death. Is this murder? It is murder if A. was Z.’s jailor, directed by the law to furnish Z. with food. It is murder if Z. was the infant child of A. and had, therefore, a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z. was a bed-ridden invalid, and A., a nurse, hired to feed Z. It is murder if A. was confining Z. in unlawful confinement, and had thus contracted a legal obligation to furnish Z., during the continuance of his confinement, with necessaries. It is not murder if Z. is a beggar who has no other claim on A. than that of humanity.

“A. omits to tell Z. that a river is swollen so high that Z. cannot safely attempt to ford it, and by this omission voluntarily causes Z.’s death. This is murder if A. is a person stationed by authority to warn travelers from attempting to ford the river. It is murder if A. is a guide who had contracted to conduct Z. It is not murder if A. is a person on whom Z. has no other claim than that of humanity.

“A savage dog fastens on Z. A. omits to call off the dog, knowing that if the dog be not called off, it is likely that Z. will be killed. Z. is killed. This is murder in A. if the dog belonged to A., inasmuch as his omission to take proper order with the dog is illegal. But if A. be a mere passer-by it is not murder.”

But the duty must be personal, and there must be some direct connection between the neglect of duty and the injury received. Certain persons, by act of Parliament, were required to make contracts for keeping a public road in repair. They omitted to do so and consequently the road became dangerous, and a traveler was thrown from his wagon and killed. The trustees were held not guilty, Campbell, C. J., saying: “The cases on this subject show a personal duty, the neglect of which has directly caused death; and no doubt where that is the case a conviction of manslaughter is right. But how do these apply to trustees of a highway? How can it be said that their omission to raise a rate or to contract for the separation of the road directly caused his death? If so, the surveyor or inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of

keeping the road in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent."

The next case, *Reg. v. Smith*, 10 Cox C. C. 82, shows a condition of things not included in these illustrations, but which it is now well settled constitutes a crime by omission, *viz.*: where the sufferer is prevented by the act of the prisoner from obtaining the assistance which he withholds.

*OR SUFFERER IS PREVENTED BY ACT OF
PRISONER.*

REG. v. SMITH.

[10 Cox, C. C. 82.]

When Martha Turner entered the domestic service of Mrs. Charlotte Smith, people who saw her saw a big, strong girl. Martha, however, had a rather weak mind, and Mrs. Smith was a modern Lucretia Borgia. Having taken a dislike to Martha after a few months she gave her a dark, damp room to sleep in, and only an occasional crust to eat. The reader will, perhaps, ask why Martha did not leave. Gentle reader, why did not Smike forsake the educational institution of Mr. Squeers? Martha was as much afraid of Mrs. S. as ever Smike was of Mr. S. So the poor girl stayed in her dark, damp room, — not for long, however, for one morning when an officer, who had been informed of the case, went into her lodging, he found her so weak that he had to carry her to the hospital where she died in a day or two.

Mrs. Smith, I am glad to say, was indicted for her murder. She pleaded that she was not obliged to furnish any better lodgings and food, and that Martha could have gone away if she did not like the fare. But the court distinguished this case from that of the Brothers and Sister Smith. "It cannot be denied," said the judge, "that this is so. The contract of the

master to supply his servant with sufficient and proper food and lodging, makes him civilly but not criminally liable for the breach of it. In order to make him criminally responsible for neglecting to do so, it must appear that the master has got the servant so under his control and dominion as to be helpless, like a lunatic or infant, and consequently unable to take care of himself. Now was there in this case sufficient evidence that the deceased stood in such a relation to the prisoner, that although there were no bars, locks, or bolts she was so terrified by the prisoner that she was, in effect, as much restrained from withdrawing herself as if she had been so confined? If there has been such evidence it will support a conviction."

MOTIVE OF PERSON IMMATERIAL.**REYNOLDS v. UNITED STATES.**

[98 U. S. 145.]

The defendant, who was a resident of Utah, and a member of the Church of Latter Day Saints, better known as Mormons, was married according to the due forms of the church. There would have been nothing wrong in this had not he had at the time another wife living. Reynolds was indicted for bigamy. He replied that in doing as he had done he was only practicing the doctrines of his church and his own religious belief on this subject. This, however, was held to make no difference, and the Mormon was sent to prison, for a party's religious belief, the court ruled, cannot be accepted as a justification for his committing an act made criminal by the law of the land.

When the law commands anything to be done or refrained from, a citizen's idea of its justice or propriety must go to the wall.

A man might believe that human sacrifices were right and commendable to the gods, as the ancients did, but if he were to introduce his belief into practice, he would be likely to be in time introduced to the hangman.

When Mr. Moses is called to account for keeping his shop of the three balls open on Sunday, he cannot escape by showing that he conscientiously believed that it was right to labor on Sunday and only wrong not to close up shop and repair to the Synagogue on Saturday. *Com. v. Has*, 122 Mass. 40. A parent, under the influence of a belief, that his child will be happier out of this world than in it, may kill it, without malice and with regret; but this motive is

of no avail on a prosecution for the murder. *People v. Kirby*, 2 Park. 28. Miss Susan B. Anthony, a few years ago, attempted to carry out her theories of woman's rights in this way. She firmly believed that women had a legal constitutional right to vote, and so at an election for members of Congress, in November, 1875, she put her ballot in the box. When she was indicted for illegally voting, the judge thought it so clear a case that he instructed the jury that there was nothing for them to do but find her guilty. And they did, and she was fined. She voluntarily did an illegal act, and became subject to the penalties of the law, and even assuming that she believed she had the right to vote, this constituted no defence, if, in fact, she had no such right. *U. S. v. Anthony*, 11 Blatchf. 200.

*INTENT PRESUMED FROM ACT.***STATE v. SMITH.**

[2 Stroh. 77.]

The National Holiday at Gilesburgh, South Carolina, in 1847, was being celebrated in a rather hilarious manner. Towards night most of the participants were drunk, and some of them were noisy. Both drunk and noisy was Moses Smith. As the crowd commenced to disperse a man named Carter rode past them, and made some uncomplimentary remarks to his companion. A little beyond the road a couple of negro children sat on a stone fence and watched the procession. As Carter rode away, Moses drew a pistol and fired at him. Carter rode on unhurt, but,

Two little negroes sitting on a stone.
One of them dropped off and then there was but one.

When Moses was arrested for the murder of the child his plea was that he had fired his pistol at Carter's horse, to make it throw him, and had never intended to kill Carter, much less the pickaninny. Moses, however, was convicted of murder.

"It is not denied," said the court, "that the question is the same as if he had killed Carter, instead of the negro, for if one designs to kill A. but by accident kill B., his crime is the same as if he had executed his intended purpose. * * * The law will imply that the prisoner intended the natural and probable conse-

quences of his own act, as in the case of shooting a gun into a crowd, the law will imply from the wantonness of the act, that he intended to kill some one, although it might have been done in sport. If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction that where the intention was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter. But in this case the act done indicated an intention to kill — it was calculated to produce that effect and no other — death was the probable consequence and did result from it and the crime was murder."

"It is a maxim older than the law of England," said Lord Abinger on one occasion, "that a man is not guilty unless his mind is guilty." *Reg. v. Allday*, 8 C. & P. 136. In other words there is no crime unless there is a criminal intent.

As, however, the law can not look into a man's mind to find out his intent, it is forced to judge of his intention from his acts. Acting on this principle the presumption of law is that a man is held to have intended the natural and ordinary consequences of his acts.

The law is summed up by Chief Justice Shaw in *Commonwealth v. York*, 9 Metc. 103, as follows: "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So where a dangerous and deadly weapon is used with violence, upon the person of another, as this has a tendency to destroy life or do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act."

And the intent, as in Moses Smith's case, may be transferred. Where a person in perpetrating or attempting to perpetrate a felony, unintentionally kills another, such killing is murder at common law. If the unintentional killing was done in attempting a misdemeanor, then it is manslaughter. Coke has given an apt illustration of this distinction, which is found in all the text-books on criminal law. A and B. are neighbors, and both own chickens. A. intending to kill and steal B.'s chickens shoots at them, but kills B., who was on the other side of the fence and whom he did not see. C. and D. are neighbors. Under the same circumstances, C. shoots at D.'s chickens not intending to steal them, but merely wanting to wound or kill them for the purpose of annoying D. by injuring his property, C. kills D. E. and F. are neighbors also. E. in shooting at his own chickens to kill them for his own use, kills F., not knowing him to be anywhere near. A. is guilty of murder, C. is guilty of manslaughter, while E. is not guilty of any criminal offense.

And where a statute prohibits an act, and it appears to have been the intention of the Legislature that the person doing the forbidden act should do it at his peril, he is liable for so doing even although he had no criminal intention. See next case.

*ACTS PROHIBITED BY STATUTE — INTENT
IMMATERIAL.*

COMMONWEALTH v. MASH.

[7 Metc. 472.]

This was an American Enoch Arden case. Early one morning in November, 1838, Peter went out of his house in Nantucket after telling his wife, Mehitabel, who was cooking the breakfast, that he would return to that meal in the course of a few minutes. But the minutes went by and no Peter. The things on the table got cold, and no Peter. The days came and the days went by for four long years, and still no Peter. Then Mehitabel gave him up, and yielding to the solicitations of William Barrett, was married to him on the 10th of April, 1842. But the wedding bells had scarce ceased ringing and the wedding feast was hardly over, before into the Barrett homestead stalked Peter. Mehitabel fainted, William swore. Now there was an ugly law on the statute book of Massachusetts which said it should be a crime for any person, having a husband and wife living, to marry another person, — unless the husband or wife should have been absent beyond sea for seven years. When Mehitabel had recovered from the shock of her first spouse's appear-

ance she was taken to court to answer a charge of bigamy.

And here she was told by the learned Chief Justice Shaw that she had done very wrong and would have to be convicted even though she honestly believed when she married William that Peter was dead, and during his absence had inquired far and near but could obtain no tidings of him. "It was urged in the argument," said the judge, "that where there is no criminal intent there can be no guilt, and if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense; but the conclusion drawn from it, in this case, by no means follows. Whatever one voluntarily does, he, of course, intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years continued absence without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent by purposely doing that which the law expressly prohibits."

REG. v. PRINCE.

[L. R. 2 C. C. R. 154.]

Because Henry Prince fell in love with Annie Phillips, of Kingston on Thames, sixteen of England's highest judges had to meet in consultation, and decide a very intricate and difficult question. There would have been no trouble if Father Phillips had not taken a very strong dislike to Henry, or if Annie had been a few years older. But as she was not of age, and the stern parent could not be won over, the lovers agreed to elope. They carried out their plan, but were pursued and captured, and Henry was indicted under a statute which provided that whoever took out of the charge of her father and against his will "any unmarried girl under the age of sixteen years," should be punished.

Henry's only defense was that he thought she was eighteen years old; that Annie told him so, and her appearance made him believe her statement to be true. But fifteen of the sixteen judges were of opinion that this made no difference. "The Legislature has enacted," said Bramwell, B., "that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen."

There was a statute in Massachusetts making it an offense to admit a minor to a billiard-room without the written consent of his parent or guardian. Samuel Emmons kept a billiard-room, and to it one evening came Austin Lynde and Henry Macdonald. Before he came in, Emmons asked Lynde if he was over twenty-one, to which he replied that he was, and he certainly looked like it, being full grown. So Emmons, believing him to be over age, let him play,

and being subsequently prosecuted under this statute, pleaded this as an excuse. But the court said it made no difference. "It was not material to show that the defendant did not know or have reason to believe that the alleged minor was under age. The prohibition of the statute is absolute. The defendant admitted him to the room at his peril, and is liable to the penalty whether he knew him to be a minor or not. The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission and need not be proved." *Com. v. Emmons*, 98 Mass. 6.

Another statute provided that whoever sells, or keeps, or offers for sale adulterated milk, or milk to which water or any foreign substance has been added, should be punished. Now Patrick Farren sold Bridget Donnigan several quarts of milk which knew more of the pump than of the cow, and though Patrick called the saints to witness that he knew not that this was so, he had to pay the fine. "It is of the greatest importance," said the court, "that the community shall be protected against the frauds now practiced so extensively and skillfully in the adulteration of articles of diet by those who deal in them, and if the Legislature deem it important that those who sell them shall be held absolutely liable, notwithstanding their ignorance of the adulteration, we can see nothing unreasonable in throwing this risk upon them. It is the same risk which every man takes who sells intoxicating drinks, the law making him liable to the penalty although it is not proved that he knew that the liquors were intoxicating." *Com. v. Farren*, 9 Allen, 489. And in a case where another milkman had been following Patrick's example the court said: "The defendant in this case contends that the statute is unconstitutional because it is in derogation of common right. The substance of the argument is this: It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore the Legislature has no power to make the sale of milk and water when mixed, a penal offense unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with a fraudulent intent. It is for the Legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud and to adapt the protection to the nature of the case. They have seen fit to require that every man that sells milk shall take the risk of selling a pure article. No man is obliged to go into the business; and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered." *Com. v. Waite*, 11 Allen, 264; *State v. Smith*, 10 R. I. 258.

So where a statute makes it an offense to sell liquor to a minor or a common drunkard, a person selling liquor to one who he believes at the time not to be, but who turns out to be, one or the other, is punishable. *Ulrich v. Com.*, 6 Bush, 400; *Barnes v. State*, 19 Conn. 898. And where a penalty was given against a magistrate for marrying minors without the consent of their parents, it was held that the magistrate was liable, notwithstanding he honestly believed, after diligent inquiry, that the persons married were of lawful age. *Beckham v. Nacke*, 56 Mo. 546.

It is assumed in all these cases that the Legislature in passing such laws knew that it was generally impracticable to prove the knowledge, and regarded the protection of the community from the practices it prohibited as more important than the occasional injustice of punishing an innocent wrong-doer. For the evil to the community is the same whether the unlawful intent is present or not. Therefore, the true rule on this point seems to be that the court must decide whether it was the intention of the Legislature that the person doing the forbidden act should do it at his peril or that his ignorance as to the existence of the fact or his mistaken belief, in good faith and on reasonable grounds that it did not exist, should excuse. *Steph. Dig. Ev.*, Art. 84.

*IGNORANCE OR MISTAKE OF LAW NO EX-
CUSE.*

WHITTON v. STATE.

[37 Miss. 879.]

Whitton and Ford, who were partners in the grocery business in a Mississippi town, had a license to sell spirituous liquors. One day a man "half seas over," as the phrase is, staggered into the store and asked for whiskey. The bottle was set before him; he paid for and tossed down a dram, "Some says three fingers, some says two, I leave the choice to you," as the poet laureate of England has remarked.¹ Now, as it was against the law to sell intoxicating liquors to an intoxicated person, the firm were speedily indicted. When brought into court they did not deny the fact; all they had to say was that they did not know they were doing anything wrong; they had no idea that there was such a law on the books.

But they were told that this was no excuse. "A person," said the court, "is bound to know the law; he is held to the consequences of a wilful violation of it, whether he knew of its existence or not. Otherwise it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence, the legal

¹ Or perhaps it was John Hay.

presumption that every man knows the law and that his violations of it are willful."

"All men are presumed to know the law." This is an old maxim, and its wisdom is sufficiently obvious. If any other rule was to be permitted, the most ignorant and unlearned, who are apt to be the most brutal and criminal, would go unpunished. A couple of illustrations will show how strictly this principle is applied. M. Barronet, a Frenchman, fought a duel in England, killing his man. Monsieur derived all his views of dueling from his training and residence in France, where at that time (and probably yet) killing in this manner is no murder. Nevertheless his ignorance that to kill a person in a duel was murder by the laws of England was held no defense. Barronet's Case, 1 El. & Bl. 1.

A sailor was once indicted for violating a statute which was passed while he was at sea, and could not by any possibility have heard of its existence. The judges held him guilty, but thought it such a hard case that they, with praiseworthy unanimity, recommended the king to pardon him. *Rex v. Bailey*, R. & R. 1.

MISTAKE OF FACT MAY NEGATIVE INTENT.**COMMONWEALTH v. PRESBY.**

[14 Gray, 65.]

“Taking one consideration with another
The policeman’s lot is not a happy one,”

Said Officer Presby, as he stepped into the dock to answer a charge of assault and battery. Walking his beat one night in the city of Lowell, he saw in the gutter the form of a man. He tried to raise the man on his feet but could not, and the atmosphere within a radius of half a block was decidedly alcoholic. “Dead drunk,” said the officer; and intending to follow his orders to arrest all intoxicated persons found in the street, he conducted the man to the station-house. On the way there the man revived and wanted to go home, explaining [that he had fallen down in a fit, and that his friends after applying whisky as a stimulant, had gone for assistance. But the policeman thought this a ruse, and the man had to spend a night in a cell. When he was discharged the next morning he lost no time in having the policeman indicted.

As the policeman had no authority to arrest a person not intoxicated, and as it was admitted that the man told the truth, the question was whether the fact that the policeman had made an honest mistake was any defense. The jury thought not and convicted him. But in the Supreme Court the law was laid down in

the policeman's favor. "If he acted in good faith, upon reasonable and probable cause of belief, he is not to be regarded as a criminal because he is found to have been mistaken."

If a person acts under a state of *facts* which he, in good faith and on reasonable grounds, believes to exist, he is treated in the same manner as he would have been had such state of facts actually existed. An old English case in Lord Hale's time is generally cited to illustrate this principle. A gentleman being wakened in the night by a noise in the kitchen, seized his sword, and seeing a form there secreted in a closet made a thrust at it thinking it a burglar. The person in the closet was no burglar, but a female friend of a maid who had, unknown to the master, come home with the maid, and had been allowed to sleep in the kitchen. Lord Hale held that the act having been done under a reasonable belief that she was a felon, her killing was not criminal. *Levett's Case*, 1 Hale, 474. Mr. Justice Foster relates a case of this kind which came before him. Upon a Sunday morning a man and his wife went a mile or two from home with some neighbors to take dinner at the home of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He taking it up touched the trigger, and the gun went off and killed his wife whom he dearly loved. It came out afterwards that while the man was at church, a person belonging to the family privately took the gun, charged it and went after game; but before the service at the church was ended, returned it loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearances, as he had left it. "I did not inquire," said Mr. Justice Foster, "whether the poor man had examined the gun before he carried it home; but being of opinion upon the whole evidence that he had reasonable grounds to believe that it was not loaded, I directed the jury that if they were of the same opinion they should acquit him, and he was acquitted." *Fost. Cr. L.* 265.

But there must be reasonable grounds for the belief, and the party must not be guilty of negligence. In the case before Mr.

Justice Foster, the man had good reason to believe that the gun was unloaded, for he had discharged it himself only a short time before. Where a man picked up a revolver which he knew had a cartridge in it, but which he thought was too old to explode, and snapped it at a woman to frighten her, and the pistol went off and killed her, it was held that, though a mistake on his part, it was so negligent a mistake that he must be convicted of manslaughter. *State v. Hardie*, 47 Ia. 647.

*COMPULSION MAY EXCUSE.***REX v. CRUTCHLEY.**

[5 C. & P. 183.]

A rural mob engaged in breaking threshing machines forced Crutchley, a farm laborer, and others whom they met on their march, to give each machine a blow with a sledge hammer. Crutchley, as soon as he got a chance, ran away. Being afterwards apprehended and tried for breaking the machine, he was acquitted, on the ground that an act done under compulsion is *not a crime*.

An involuntary act, whatever effects it may produce, cannot constitute a crime. If A., pushing B. against C., pushes C. over a precipice, A. and not B. is guilty of C.'s murder, if he die from the fall. 1 Hale P. C. 434.

Compulsion is very well defined by Stephen in his History of the Criminal Law. "A man is under compulsion," he says, "when he is reduced to a choice of two evils, where he is so situated that in order to escape what he dislikes most, he must do something which he dislikes less, though he may dislike extremely what he determines to do." A criminal, for example, walking to execution is under compulsion, if any man ever is or was, but his motions are voluntary. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils.

There are three forms of compulsion which may excuse an act which would otherwise be a legal crime. They are—

1. *Compulsion by a husband over a wife.* This class of cases has been already noticed. See *ante*, p. 4. The exception is rather illogical when confined, as it is, to the particular relation of wife. "As the law stands it produces this result. A husband and wife of

mature age, and their daughter of fifteen commit a theft. It is proved that the girl acted under actual threats used by her father. Nothing appears as to the wife's part in the matter except that her husband was present when she committed the offense. "The wife must be acquitted on account of the presumed coercion of the husband; the daughter must be convicted, notwithstanding the actual coercion of her father." Steph. Hist. C. L. 106.

2. *Compulsion by threats of injury to person.* Whatever is necessary for a man to do to save his life, he may do. If he joins a band of rebels from fear of death if he refuses, he is not a traitor, while the constraint remains. *R. v. McGrowthier*, 18 How. St. Tr. 894. And where the threats are made by a body of rebels or rioters, threats of injury to property are sufficient to excuse him. Steph. Hist. C. L. 106.

3. *Compulsion from necessity.* The law of self-defense which is stated further on, falls within this division. Other instances suggest themselves. Everything has to yield to necessity, and the law recognizes the universality of this principle. A person clinging to a plank in the sea, sufficient only to support one, would be justified in pushing off another who should try to save himself by grasping it. A person whose house is on fire may seize without incurring the charge of felony, the hose of a neighbor to extinguish the fire. A person who is bathing and whose clothes have been stolen may snatch up clothing he may find on a clothes line so as not to be obliged to enter a village naked. Whether a person who is starving may help himself to food, and not be a thief in the eye of the law, is disputed. But Mr. Bishop, whose opinion is of great weight, thinks he may. Bish. C. L., sect. 849.

*INDICTABILITY OF ATTEMPTS.***GRIFFIN v. STATE.**

[26 Ga. 498.]

Intending to enter a store in the town where he lived and steal some jewelry which he knew was there, Griffin took an impression of the lock and had a false key made. He was prevented from carrying out his design, but was indicted for an attempt. It was held that he might be convicted. "Here," said the court, "are two acts toward the accomplishment of a felonious object, and done with the intent to accomplish it."

*PREPARATION NOT ATTEMPT.***PEOPLE v. MURRAY.**

[14 Cal. 159.]

“A man may not marry his sister’s daughter.” So saith the prayer book; and the statutes of California contain an inhibition of the same kind. But love laughs at prayer books and statutes as well as at locksmiths. So Mr. Murray persuaded his niece to elope with him, and sent for a magistrate to marry them. The magistrate did not come; a policeman did, and Mr. Murray was indicted for an attempt to contract an incestuous marriage.

Mr. Murray, however, was discharged. “The evidence,” said the court, “shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt, and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: A party may purchase or load a gun with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim there is only preparation and not an

attempt. For the preparation he may be held to keep the peace; but he is not chargeable with any attempt to kill. So in the present case the declaration and elopement and request for a magistrate were preparatory to the marriage; but until the officer was engaged and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness that the attempt was made. The attempt must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party."

A mere intent existing in the mind to commit a crime is not a punishable offense.

But an "attempt" to commit a crime is punishable. An attempt to commit a crime is an act done in part execution of a design to commit a crime. There must, therefore, to constitute an indictable attempt be an *intent* and an *act*.

The *act* need not be done in execution of the crime—for then the actual crime would be committed and the party would be indictable for that—but it is sufficient if it is done in furthering the carrying out of the intent. But here it must be borne in mind that an act remotely leading toward the commission of the crime is not sufficient—the act must be immediately connected with it. For instance, if a man intends to commit a murder, and is seen to walk toward the place of the contemplated scene, that would not be enough. Roberts' Case, Dears. 550. Or a man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. The man cannot in law be said to have attempted to commit the murder. He merely attempts to carry an intention into effect. Reg. v. McPherson, D. & B. 196. Or a man buys a gun wherewith to commit a murder, or a box of matches to fire a house; if he do nothing further he cannot be said to have attempted either crime. Reg. v. Cheeseman, 9 Cox, C. C. 108. He has made "preparations," for committing the crime; but mere preparations are not sufficient to constitute an attempt. This is the reason that the uxorious Mr. Murray was not found guilty. But in another case in England where a party took a

false oath in order to procure a marriage license, it was held that he was guilty of an attempt to marry without a license. "It is said," said the Chief Justice, "that there was no offense because a marriage was not actually had, but nothing is more clear than this: that any one step necessary and useful for the purpose, willfully taken towards the completion of a misdemeanor, is a misdemeanor." *Reg. v. Chapman*, 8 Cox, C. C. 487.

ATTEMPT VOLUNTARILY ABANDONED.**REG. v. TAYLOR.**

[1 F. & F. 511.]

Taylor was indicted for attempting to set fire to a stack of corn. Taylor was a tramp, who being refused alms from a farmer, became very abusive and threatened to burn him up. The farmer and one of his servants watched him; saw him go to a neighboring stack, kneel down and strike a lucifer match, but seeing that he was discovered he blew out the match and went away without firing the stack.

The court held that if the tramp intended to set the stack on fire, and would have done so if he had not been interrupted, he was guilty of an attempt.

Reg. v. Taylor decides the principle that if the attempt be voluntarily abandoned from surprise or interruption, or from fear of detection, it is none the less a punishable attempt.

So if the abandonment be involuntary. Goodman (his name was a misnomer in this instance) intending to commit arson, saturated a blanket hung against the side of a building with oil. He lighted a match, held it till it burned well and then put it against the blanket. But the match went out, and Goodman not having another, the bonfire had to be delayed. It was held that the attempt was complete. "The fact," said Hagarty, C. J., "of his going away or ceasing further action after the match went out, not by any act or will of his, seems to put the matter just as if he had been inter-

rupted, or was seized by a police officer at the moment. It seems to me that the attempt was complete, as an attempt, at that moment and no change of mind or intention on the prisoner's part can alter its character." *Queen v. Goodman*, 22 U.C.C.P. 388.

ATTEMPT TO COMMIT AN IMPOSSIBILITY.

STATE v. WILSON.

[30 Conn. 500.]

In the crowd which attended the funeral of General Lyon, at Hartford, Connecticut, in September, 1861, were a couple of pickpockets. One of them attempted to "work" an old lady who was watching the procession, and had his hand in her pocket when he was seized and taken to the lock-up. It turned out that the old lady's pocket was like Mother Hubbard's cupboard—and that the pickpocket was doing an impossible thing in trying to rob a woman who had nothing to rob.

But the court said that this made no difference. "It is claimed," said Butler, J., "that there must be present ability to perpetrate the offense; that if in this case the pocket was empty, there could be no such ability. * * * There must undoubtedly be present ability to perpetrate the offense. The person must be of legal age, *compos mentis*, and in a situation to effect

the purpose, directly or by the agency of others. But it is not true that the thing intended to be taken must be where the attempting thief supposes it to be, or that there must be, in fact, property where he supposes there is. It is sufficient if he supposes there is property in the pocket, trunk, or other receptacle, and attempts by some act, adapted to the purpose, to obtain it feloniously."

To *attempt* is to make an effort to effect some object; to make a trial or experiment; to endeavor to use exertion for some purpose. A man may make an attempt, an effort, a trial to steal by breaking open a trunk and be disappointed in not finding the object of his pursuit, and so not steal in fact. So a man may make an attempt, an experiment, to pick a pocket by thrusting his hand into it, and not succeed because there happens to be nothing in the pocket. Still in both cases he has clearly made the attempt and done the act towards the commission of the offense. *Com. v. McDonald*, 5 *Cush.* 865. In Massachusetts, in the year 1863, it was against the law for a person without authority from the President or Governor to solicit a person to leave the State to enter military service. One Justin Jacobs tried to persuade Benjamin Darling to do this, and was indicted. It turned out that Darling was no man for a warrior; his physical condition was such that (Falstaff being dead some years) no recruiting officer would have mustered him in. Mr. Justice Gray, in deciding that this constituted no defense, laid down the law very clearly as follows: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance. Upon this principle, on an indictment under a statute against passing or disposing of forged bank-notes with intent to defraud, it has been held no defense that those to whom the notes were passed knew them to be forged, and therefore could not be defrauded. *Rex v. Holden, R. & Ro.* 154; *Com. v. Starr*, 4 *Allen*, 801. So a statute

making it felony to administer poison, or use any instrument with intent to procure the miscarriage of any woman, extends to a case in which the woman was not pregnant. *Reg. v. Goodchild*, 2 C. & K. 293." *Com. v. Jacobs*, 9 *Allen*. 275.

*PRINCIPALS AND ACCESSORIES.***BREESE v. STATE.**

[12 Ohio St. 146.]

Being quite "broke," Breese, and a couple of his pals, made up their minds to rob a store. But, finding out that the owner of the store slept there every night, they were forced to change their scheme. Fortune favored them, however. About this time a Mr. McGhee gave a party, and it was agreed between the three that Breese should induce the storekeeper to go to the party, and while he was there the pals would go through the store. The plan succeeded. The storekeeper yielded to the arguments of Breese, and went with him to the party. But while the revelry went on the two pals were busy, and when the storekeeper returned, his stock was much lighter than when he went away. The police were sent for, and finding Breese the possessor of more silk handkerchiefs and jewelry than gentlemen usually carry, they arrested him, and the whole scheme speedily leaked out.

Breeze was indicted for the burglary and convicted, it being held that he was a principal in the second degree. "Any participation in a general felonious plan," said the court, "provided such participation be concerted, and there be a constructive presence, is enough to make a man principal in the second degree.

The defendant was by the agreement not only to procure the storekeeper to go to the party, to give his confederates greater security from detection in the act of breaking into the store, but * * * to keep him there while his confederates were engaged in breaking said store, and in concealing the fruits of said crime in pursuance of said previous confederacy."

Those who participate in the commission of crimes are either principals or accessories. Principals are either of the *first* or the *second* degree; accessories are either *before* or *after* the fact.

A person may

- (a.) Commit the crime with his own hand; or,
- (b.) Suggest a crime to another, and persuade him to commit it.

The crime so suggested

- (c.) May be committed, or,
- (d.) May not be committed.

When it is committed, it may be done

- (e.) By a single person, alone at the time; or,
- (f.) By one or more, in the presence of others, helping or counseling its perpetration.

After it has been committed the criminal may be

- (g.) Assisted to escape, or helped to use the proceeds of his crime.

To make these cases clearer, we will give an illustration of each case:—

- (a.) A. meets a man and kills him or robs him, or goes to a house and steals therefrom.
- (b.) B. persuades or hires a ruffian to kill an enemy.
- (c.) C. instigates a ruffian to rob a neighbor. The ruffian robs the neighbor.
- (d.) D. advises a person to murder his wife. The person refuses to do so.

(e.) E. asks a ruffian to murder an enemy. The ruffian meets the enemy alone in the woods and kills him.

(f.) F., G., and H., go out with a design to rob. F. commits the robbery. G. stands by ready to help. H. is stationed some way off, to give the alarm if any one comes.

(g.) I. robs a house. J. hides him and helps him to escape to another country.

In the above cases A. is a principal in the first degree, C. is an accessory before the fact, D. is only guilty of the misdemeanor of incitement, E. is an accessory before the fact, F. is a principal in the first degree, G. and H. are principals in the second degree, J. is an accessory after the fact.

The test as to whether a person is a *principal* or an *accessory*, is whether he was present or absent at the commission of the crime. If he was present, he is a *principal*; if he was absent, he is an *accessory*.

A principal in the first degree is the actual perpetrator of the crime. (A., F., and I., in the illustrations above.) He must be present at the place, and do the act with his own hand. But the hand of an innocent agent is considered his own hand in the eye of the law. Smith tells Robbie, a child under seven, to bring him goods from a store without the proprietor seeing him. Robbie does so. Smith is a principal in the first degree. Or, Smith, knowing a note to be forged, asks his friend, Brown, who thinks it genuine, to get it changed for him. Brown does so, and gives Smith the money. Here Smith is a principal in the first degree. The reader will note that, if Brown had known that the note was forged, Brown would have been the principal in the first degree, and Smith an accessory before the fact. "But Smith," it will, perhaps, be said, "was not present when the goods were taken by Robbie, or the note changed by Brown, and your definition above says that he must be present." True; but the law gets around this by considering Smith as being constructively present. *Reg. v. Manley*, 1 Cox, C. C. 104; *Reg. v. Soares*, R. & Ry. 25.

A principal in the second degree is one who is present at the commission of the crime, aiding and abetting the commission. Mr. Breese, in the principal case, was this kind of a fellow; and so were G. and H., in the illustration above. G., it will be noticed, was actually present, while both H. and Breese were only constructively present. But, for the purposes of punishment, they are all in the same boat.

An accessory before the fact is one, who, though being absent when the crime was committed, procures or aids its commission. In the illustration above, C. and E. were this kind of people.

It is clear that a person setting another up to commit a crime, is doing a very dangerous thing, for the party selected may not follow his instructions to the letter. He may

- (a.) Commit a different kind of crime; or he may
- (b.) Commit the selected crime on another person; or,
- (c.) The instigator may weaken, and want to get out of the affair.

The law on this subject is:—

(a.) That the instigator is guilty in this case. For instance, A. asks B. to murder C. by shooting him. B. murders C. by stabbing. A. is an accessory before the fact to the murder of C.

(b.) That the instigator is not guilty in this case. A., for example, instigates B. to murder C. B. murders D. A. is not an accessory before the fact to the murder of D.

But in both of these cases, if the different crime was the probable consequence of the instigation, the instigator is an accessory before the fact. A., for example, describes C. to B. and instigates B. to murder C. B. murders D., whom he believes to be C., because D. corresponds with A.'s description of C. Or, A. instigates B. to rob D. B. tries it, but D. resists, and B. kills D. In both cases A. is an accessory before the fact to the murder of D. Steph. Cr. L. 29.

(c.) The instigator is responsible until he has given the principal notice that the thing is to go no further. A. advises B. to murder C., and afterwards, by letter, withdraws his advice. B. murders C. A. is not an accessory before the fact, if his letter reaches B. before he murders C.; but he is, if it arrives afterwards.

An accessory after the fact is one, who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. This was J.'s position in the illustration above. To this rule there is one exception — the case of a married woman assisting her husband. See *ante*, p. 4.

Mr. Harris gives an imaginary case, in which each of the four kinds of participation in a crime described above is to be found. A. incites B. and C. to murder a person. B. enters the house and cuts the man's throat, while C. waits outside to give warning in

case any one should approach. B. and C. flee to D., who, knowing that the murder has been completed, lends horses to facilitate their escape. Here B. is a principal in the first degree, and C. in the second degree; A. is an accessory before the fact, and D. an accessory after the fact.

In treason, all the participants are principals. The courts were very hard on treason, and spread the net very wide, so as to catch every disloyal person when possible. And in misdemeanors there are no accessories, all the participants being regarded as principals.

CHAPTER III.

OFFENSES AGAINST THE PUBLIC ALONE.

TREASON.

UNITED STATES v. HOXIE.

[1 Paine, 265.]

The embargo laws which our government passed early in the present century did not at all please Mr. Hoxie, of Vermont. He owned a good deal of timber which would bring a good price in Canada, if he could only get it there. But there were United States officers all along the border whose duty it was to see to it that nothing of the kind went into Canada. Mr. Hoxie was determined that his timber should go. So he built a raft of it and hiring and arming a crew of three score men determined to take it out of the country, peacefully if he could, forcibly if he must. Near the border troops were stationed to prevent such a thing. As the raft passed them the troops fired at the raft, which fire Mr. Hoxie's men returned with spirit, and in dead earnest, Mr. Hoxie joining in the fight very actively. The end of it was that the raft forced its way across the line and to the Canadian soil, the men were paid off, and the timber sold. Mr. Hoxie was subsequently captured and indicted for treason

in levying war against the United States. It was decided, however, that Mr. Hoxie's resistance to the law being for a *private* and not for a *public* purpose, he was not guilty of treason.

Treason is always regarded as the highest crime punishable by the law and the penalty is always death. At common law there were two kinds of treason: *High* treason, which was a violation of the allegiance owing to the king; and, *petit* treason, which was a violation of the allegiance owing to a superior—thus, for a wife to kill her husband or a servant his master was *petit* treason. This crime has been abolished, and is now simply murder. So that "Treason," as used at this day means high treason. In England, as in all monarchical countries, treason could be committed in very many ways, for example, by imagining the Sovereign's death, levying war against him, adhering to the king's enemies; killing his wife or son, or violating his wife or daughter, killing the chancellor or judges, and in many other ways. In the United States, however, the crime is strictly defined by the constitution and consists of "levying war against the government or adhering to its enemies."

United States *v.* Hoxie shows that to "levy war" means to carry on a public war against the government and not a private war for a private purpose. Tested by this rule, the number engaged in the outbreak or resistance to the national authority is not material. In 1851, some slaves having escaped from Maryland to Pennsylvania, the master followed them and with United States officers attempted by authority of the Fugitive Slave Law to take them back. Led by one Hanway, the slaves resisted arrest, and the Federal officers were driven away—the owner being killed. Hanway was indicted for treason in levying war against the United States. On the trial Mr. Justice Grier in charging the jury said: "To constitute the 'levying war' the insurrection must be to effect something of a *public nature*, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution or compel its repeal. A band of smugglers may be said to set the law at defiance, and to have conspired together for that purpose, and to resist by armed force the execution of the revenue laws; they may have battles with the officers of the revenue in which numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but

merely for private lucre or advantage. A whole neighborhood of debtors may conspire together to resist the sheriff, and his officers in executing process on their property, they may perpetrate their resistance by force of arms, may kill the sheriff and yet they will be liable only as felons and not as traitors. Their insurrection is of a private, not of a public, nature; their object is to hinder or remedy a private, not a public, grievance. A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbors in continuing to resist the capture of any of their number; they may resist with force and arms their master or the public officers who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose. It is true that, constructively, they may be said to resist the execution of the Fugitive Slave Law; but in no other sense than the smugglers resist the revenue laws and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called levying war. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal."

On the other hand to take a stand against the government for the purpose of overthrowing its authority everywhere, is a different thing—the universality of the design making it a rebellion against the State. The acts of the Southern States, and of each man engaged in the resistance of the national authority in 1861 and until the war closed, were clearly "levying war" within the constitution, and all parties were technically guilty of treason. But as some one has written—

Treason can never prosper — what's the reason?
If it does prosper, none dare call it treason.

When the attacks by a discontented people on the State succeed they are, of course, beyond the criminal law. And sometimes, too, when they do not succeed; but yet the outbreak has changed into a war in which each side is strong enough to compel the other to treat its adherents as enemies and not as criminals. This was the case with our late civil war.

Mispriision of treason is concealing a knowledge of a treason which has been committed or is contemplated. It is punished by a fine and imprisonment.

Sedition is by word, deed, or writing to disturb the tranquility of the State, and stir up opposition to the government. The word is commonly used to include words written or spoken, but it may include many other acts such as training to arms, holding unlawful meetings, etc.

Piracy consists in committing acts of robbery and depredation on the high seas which if committed on land would be felonies. The United States punishes the offense, because the "high seas" are not within the jurisdiction of any particular State. The term "high seas" includes not only the ocean, but every river, harbor, bay or other water outside the jurisdiction of any State, and where the tide ebbs and flows. The offense and punishment have been expressly defined by act of Congress. See U. S. Rev. Stat., § 5868.

BARRATRY.**STATE v. CHITTY.**

[1 Bailey, 879.]

A justice of the peace of Charleston, S. C., with an eye to the fees which would accrue therefrom, was in the habit of advising those whom he found out had grievances or claims to sue in his court. Notwithstanding that in each case the party had a just ground of action, it was held that the justice was a "common barrator" and punishable, by that law which he helped to administer, with both fine and imprisonment.

The common law does not encourage strife, and to this end punishes the stirring up of lawsuits or the meddling in disputes not one's own. Under this head come three crimes, viz.: *Barratry, Maintenance, and Champerty.*

Maintenance is meddling in a suit which is none of one's business, as by assisting either party to prosecute or defend it.

Champerty is doing the same thing, it being agreed that the party assisting shall receive a portion of the judgment when recovered.

In the old reports these crimes are frequent, but in this country, for reasons which have weighed with our judges — such as the policy of permitting a poor litigant, or one who has a valuable claim but no money to prosecute it with, to get outside assistance in carrying on his suit — these old offenses are not now regarded as crimes.

Barratry, however, which is the frequent stirring up of suits and quarrels, is still an indictable offense. "Barratry," says a modern writer, "is habitual champerty or maintenance, and is committed where one has become so accustomed to intermeddle in strifes or controversies in and out of court that he may be said to be a common mover, exciter, and maintainer of suits or quarrels, as one becomes

a common scold by the too frequent and habitual abusive use of the tongue, or a common seller of liquor who habitually sells it in violation of law. A series of acts not less than three are necessary to constitute the habit which is the gist of the crime of barratry. The offense of barratry may be committed by a justice of the peace, who stirs up prosecutions to be had before himself for the sake of fees (Justice Chitty's case above), and it seems by one who unnecessarily and for the purpose of opposing his adversary brings numerous ungrounded suits in his own right. *Com. v. McCulloch*, 15 Mass. 227." May Cr. L., § 66.

*COMPOUNDING OFFENSES.***COM. v. PEASE.**

[16 Mass. 91]

Titus Pease may be said to illustrate the truth of the saying that the road of the transgressor is apt to be thorny. Discovering that one of his servants had been robbing him he promised the thief that if he would pay him, \$100 he would not send him to jail. The thief had no ready money, but having some property, Titus agreed to take his promissory note for \$100. The thief gave the note, but before paying it died, and when Titus presented it to the executor, the latter refused to recognize it at all. Titus went home feeling rather disgusted at the way his forbearance had resulted. The next morning, on being arrested on a charge of compounding a felony, he felt more disgusted, but was sure that the fact that he had got no value for the note would be sufficient to clear him.

Titus, however, was mistaken. "What," said Chief Justice Parker, "is the gist of the offense? It is the concealing of the crime, and abstaining from prosecution to the detriment of the public. Now, if a man is induced to this by the promise of money and actually takes an obligation for the money, everything necessary to constitute him a criminal in the eye of the law seems to be done."

To compound a crime is to agree not to prosecute it, knowing it to have been committed. The most common form is what used to

be called *theft bote*, viz.: forbearing to prosecute a thief if he returns the stolen money or goods, or part of them. The *agreement not to prosecute* constitutes the offense, and, therefore, if a person from whom property is stolen agrees for a consideration not to prosecute, he is guilty, though he may afterwards be compelled to prosecute by the officers of the law. *State v. Duhamel*, 2 Harr. (Del.) 532. The consideration need not necessarily be money or its worth, but may consist of any advantage accruing to the person who forbears, and proceeding from or on behalf of the felon. The crime may be committed as to either a felony or a misdemeanor.

MISCONDUCT IN OFFICE — EXTORTION.**COM. v. BAGLEY.**

[7 Pick. 279.]

In the palmy days of imprisonment for debt, a jailor was allowed to collect from the debtor the sum of twenty cents for turning the key when he came in and twenty cents more for turning the key when he went out. The defendant, who was keeper of the Newburyport jail, on receiving John Osgood into his hands, told him the fee was forty cents, which John paid. The jailor was afterwards indicted and convicted of extortion. "There is certainly no right in a prison-keeper," said Parker, C. J., "to demand a fee for letting a man out of prison the moment he is put in, and it is extortion at the common law to receive, by color of office, a fee before it is due, though no more is taken than will, in all possibility, soon become due."

If a public officer by color of his office does an illegal act, or abuses his powers from an improper motive, he is guilty of an offense — unless the illegal exercise of authority was caused by a mistake of law in good faith. If the illegal act consists in taking money or property which is not his right, the offense is called "*extortion*." If it consists in inflicting bodily harm or any other injury, it is called "*oppression*."

Extortion is committed when no money is due at all to the officer, or only a smaller amount is due, or the amount taken is not yet due. "Thus it is extortion for a justice of the peace to exact costs where they are not properly taxable, or from the party to whom they are

not taxable, or for a jailor to obtain money of his prisoner by color of his office, or for a ferryman or miller to collect tolls not warranted by custom, or for a county treasurer to exact fees for acts required in the collection of taxes, but which had not been done (*State v. Burton*, 8 Ind. 98), or for a coroner or sheriff to refuse to do his official duty unless his fees are prepaid, or to demand and receive fees where none are by law demandable (*People v. Calhoun*, 3 Wend. 420).” *May Cr. L.*, § 105.

Mr. Justice Stephen (*Steph. Cr. L.* 78), gives the following illustrations of oppression in office. A. and B., justices of the peace, refuse licenses to the keepers of public houses, because they refuse to vote as the justices wish. A. and B. commit oppression. A., a justice of the peace, sends his servant to the house of correction for being saucy and giving too much corn to his horses. A. commits oppression. A., a justice acting as such, orders B. to be whipped without such proof or information as the law requires. A. commits oppression. A., a justice, commits B., a pauper, to prison, for refusing to answer questions which A. had a right to put as to B.’s settlement, believing in good faith that A. had a legal right to commit B. A. does not commit a misdemeanor. Because in this last case, A. acted in good faith on a mistake of law.

PERJURY—ELEMENTS OF THE CRIME.**STATE v. GAGE.**

[17 N. H. 375.]

After dinner, at a tavern on a New Hampshire road, George and Potter swapped horses. Potter, when he came to try his bargain found that he had considerably the worst of it, and brought an action against George, alleging that he had warranted his horse to be sound when it was very far from it. When the trial came on Mr. Gage, very much to Mr. Potter's disgust, got on the witness stand and testified that he was present at the trade and that George did nothing of the kind.

Subsequently Mr. Gage was indicted for perjury and it was proved pretty clearly that he was not present at all. His lawyer, however, argued that as he did not know anything about it, that is to say, did not know that any warranty had been made by George, he was not guilty of perjury. But this did not save him. "The averment is," said the judge, "that he swore to the fact, and that he did not know whether it was true or not. This seems to be all that is required to bring the act charged within the description of perjury, which consists not only in swearing material things known to be true, but in swearing to them without any knowledge on the subject."

"Perjury by the common law seemeth to be a willful, false oath, by one who being lawfully required to depose the truth in any pro-

ceeding in a course of justice swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." 1 Hawk. P. C. 69. From this definition it is plain that there are no less than five requisites to the crime.

1. There must be an oath.
2. It must be willfully false.
3. The party must be lawfully required to depose the truth.
4. It must be in a proceeding in a course of justice.
5. The matter must be of "some consequence to the point in question."

In this note, and in the succeeding cases, I propose to review these requisites of the old common law in the light of the more modern American rulings. And it will be found that the definition of the old writer is substantially the law of the United States on the subject at the present day.

1. *There must be an oath.* An oath is an appeal to the Supreme Being to recognize the truth of the statement. It is calling God to witness that what one says is true. The common custom is to emphasize the solemnity of the appeal by kissing a copy of the Holy Scriptures. This, however, is not essential — it is only necessary that the ceremony should be binding on the conscience of the person taking the oath; and for this reason the peculiar rites of the Hindus and other people, on such occasions — such as cutting the head off a fowl or breaking a dish — have sometimes taken place in our courts. In any case, so long as the form is properly gone through, the fact that there has been some irregularity does not vitiate the oath. So, in the United States, the upraising of the right hand has come to be substituted for kissing the Book.

In New York some parties were sworn on what they thought was the Testament, but it turned out that the book they kissed was Watt's Hymns. It was nevertheless held that if they testified falsely they would be guilty of perjury. *People v. Cook*, 8 N. Y. 67. In an English case, a lot of poachers met at a house one night and before going out on their expedition one of them administered to the others, on a book which they thought was a Bible, an oath of secrecy. By statute, administering such an oath was an offense, and the party was subsequently indicted. He pleaded that it was not an "oath," because he had been careful not to use a Bible, having substituted an account book with a black cover. But this

was held immaterial. "If," said Holroyd, J., "the oath administered by the prisoner to the poachers was intended to make the people believe themselves under an engagement, it is equally within the act, whether the book made use of was a Testament or not." *Res. v. Brodrribb*, 6 C. & P. 571. And in modern times, in recognition of the conscientious scruples of some persons against an oath, a witness is allowed to "affirm," i.e., to simply declare that what he says is true, under pain of punishment if it is false. So that an oath, however administered, if binding on the conscience, or an affirmation, is within this part of the definition.

2. *It must be willfully false.* The "Anonymous" case, *post*, p. 89, illustrates this requisite.

3. *The party must be lawfully required to depose to the truth.* *People v. Travis*, *post*, p. 92, illustrates this part of the definition.

4. *It must be in a proceeding in a course of justice.* See *State v. Keenan*, *post*, p. 94.

5. *The matter must be of "some consequence to the point in question."* See *State v. Hathaway*, *post*, p. 96.

Subornation of perjury is procuring another to commit perjury, which he actually commits in response to such procurement.

PERJURY—OATH MUST BE WILLFULLY FALSE.**ANONYMOUS.**

[1 Wash. C. C. 241.]

A bankrupt being examined under oath as to his property was asked: "At what time did you own the brig Abigail, and when did you cease to own her?" and answered, "I cannot tell exactly the time; I believe it was at the latter end of 1799 that I first owned her. I ceased to own her I rather think in the year 1800." The truth was that at no time during that time did the bankrupt own the brig, but he was honest in his answer, having made a mistake in consulting his documents of title.

The bankrupt was declared "not guilty" of perjury.

Mr. "Anonymous" appears in the reports as a litigant very frequently. He is generally a person of influence with the reporter, and the case in which he figures is apt to have reflected rather severely on his conduct or character. His counterpart is to be found in the gentleman who, after drinking too much wine at dinner, stumbles into the lock-up, and being fined next morning at the police court, arranges it with the newspaper, in whose report of the police proceedings he appears next day as Mr. Smith or Mr. Brown.

In order to constitute the crime of perjury the oath must be willfully false. That the facts were not as the party swore they were, does not make him guilty if he believed them to be true. That he in good faith made a mistake, or thought he was telling the truth,

or relied on the advice of counsel, may all be set up in his defense. The case of *United States v. Connor*, 3 McLean, 578, is an example of this. Connor was a bankrupt. In order to get a discharge he swore to an inventory of all his property; but it was subsequently discovered that he had omitted to state that he had an interest in some property which he did not include in the inventory. He was convicted by a jury, but on appeal was more successful, for there it was seen that he had made out the schedule as it was on the advice of a lawyer. "A bankrupt," said Mr. Justice McLean, "is bound to exhibit a true schedule of all his property, and if he fail to do this willfully and fraudulently he is guilty of perjury. But if he, being unacquainted with the requirement of the law, shall be advised by his counsel after the facts have been fully stated to him, that certain items of property are not required to be stated in his schedule, and he omits them, he is not guilty of perjury."

It is not necessary, however, that the party should swear absolutely. One may be convicted of perjury in swearing that he *believes* a thing to be so and so, when he knows it is different. In an English case, a party by the name of Pedley, was asked whether he had sold certain goods of his by himself or through a broker. He answered: "I believe I sold them by a broker," knowing all the time he was lying. DeGrey, C. J., said it was a mistake which mankind (including Pedley) had fallen into that a person could not be convicted of perjury for deposing on oath according to his belief. *R. v. Pedley*, 1 Leach, 367. In another case, a witness swore that he "thought" a certain writing was not his. The jury having found that in truth and in fact he "thought" that it was his, it was held that he was liable to an indictment for perjury. "If a witness," said Lord Denman, "says that he *thinks* a certain fact took place, it may be difficult indeed, to show that he committed willful perjury, but it is certainly possible." And both his associates agreed with him, Patterson, J., saying: "There would be an easy mode by which witnesses might, in many cases, escape the consequences of perjury, if using the saving words 'I think' made them not indictable." *Reg. v. Schlesinger*, 10 Q. B. 670.

And the witness must be careful not to fool the court by a *double entendre*. A facetious fellow who was testifying before Lord Mansfield went rather too far in this direction. Being called to prove the health of a person, he swore that if he continued two hours in the way he left him he would be a dead man. This was pretty good evidence that he was as good as dead, until it turned

out that the person was in fair health, but was taking a drink when the witness left him, and had the bottle to his mouth. The wit was sent to prison though, "true it was," in the words of the old reporter, "in a sense of equivocation, that had he continued pouring the same liquor down even for much less time than two hours, he was infallibly a dead man."

PERJURY—OATH MUST BE REQUIRED BY LAW.

PEOPLE v. TRAVIS.

[4 Park. 218.]

The, schooner Hope having been wrecked in Lake Erie, Jacob Travers, the captain, in order to obtain the insurance, made before a notary a statement of the affair on oath. The statement was false in many particulars and Jacob knew it; consequently he was indicted for perjury.

But for the reason that the oath was not taken *in any proceeding required by law*, the captain was declared not guilty.

PANKEY v. PEOPLE.

[2 Ill. 80.]

There was something rotten in Johnson County, Illinois, and the grand jury, acting on what Mr. Pankey told them, proceeded to indict one of the officers for taking illegal fees. Mr. Pankey's testimony on the subject being given under oath to the grand jury, and being false, he was subsequently indicted for perjury.

The Supreme Court decided that as taking illegal fees was not indictable by law, the grand jury had been meddling with something not their business, and Pankey could not be convicted. “One of the essential

ingredients necessary to constitute perjury," said the judge, "is that the tribunal or body before whom the false swearing is alleged to have been committed must have legal authority and power to inquire into the cause or matter investigated."

It does not matter at all whether the party takes the oath voluntarily or under compulsion. But it matters a great deal that the oath should be one required by law. In an Ohio case it appeared that no affidavit of the truth of an answer in chancery was required unless the bill called for such an answer. A bill being filed against one Silver he swore to an answer — an answer too containing more poetry than truth. Luckily for him, the bill had not called for an answer under oath, and his affidavit *not being required by law* he escaped. *Silver v. State*, 17 Ohio, 365. Oaths like this one and the one taken by Captain Travers are called "voluntary" or "extra judicial" oaths and if false are not the subject of an indictment for perjury. So it is no perjury where, though an oath is required, an unauthorized person takes upon himself to administer it.

It is an extra judicial oath also where the tribunal administering it had no jurisdiction over the inquiry in which it was made. See *Pankey v. People*, *ante*, p 92.

*“ COURSE OF JUDICIAL PROCEEDING.”***STATE v. KEENAN.**

[8 Rich. (L.) 456.]

Samuel Kilpatrick had been convicted of an assault and battery on Stephen Keenan. Brought up for sentence Samuel asked permission to be allowed to show how much provocation he had suffered in the matter, and the judge permitted him to examine Keenan. Keenan being put in the witness-box swore to several lies.

Keenan being afterwards prosecuted for perjury objected on the ground that the matters he swore to were not in the course of the judicial proceeding. But his argument did not prevail and he had to go to jail. “It is necessary,” said Harper, J., “that the falsehood alleged should be material to an inquiry in the course of a judicial proceeding, though not relating strictly to the principal issue. Certainly the inquiry into the defendant’s guilt, as indicated by the circumstances of mitigation or aggravation, was properly an inquiry in the course of a judicial proceeding.”

The principle of this case is that a “proceeding in the course of justice” is not confined to the main branch of judicial proceeding or case in court—as for instance the trial—but includes all in-

cial or subsidiary proceedings. Thus swearing to an affidavit to commence a proceeding, or to obtain a continuance, or to remove the case to another court, or for a new trial,— have all been held to be within this phrase.

PERJURY—STATEMENT MUST BE MATERIAL.**STATE v. HATHAWAY.**

[2 N. & Mc. 118; 10 Am. Dec. 580.]

From the small acorn the sturdy oak doth grow,
And from one quarrel many lawsuits flow.

Shackelford and Furious had a dispute about the ownership of a cow, and Furious had Shackelford indicted for stealing it. Shackelford was tried, and acquitted. Lawsuit No. 1. Shackelford turned round and brought an action for malicious prosecution against Furious. On the trial Hathaway swore that Shackelford had bought the cow from a man named Carter. "Where did you live at the time?" "Within a hundred yards of Carter's," answered Hathaway. This was lawsuit No. 2. Hathaway lied about his residence; he did not live within a hundred miles of Carter. So he was indicted for perjury. This was lawsuit No. 3.

Hathaway, however, did not go to jail, for the court held that his place of residence not being at all material to the issue, he could not be guilty of perjury in testifying falsely concerning it. "There is no offense," said Nott, J., "the general character of which

is better understood than that of perjury, and no point better settled, perhaps, than that the oath must relate to some fact material to the issue. When I say it must relate to some fact material to the issue I do not mean that the particular fact sworn to must be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point. As where it became material to identify a flock of sheep, and a witness was asked how he knew the sheep in question to belong to a particular individual, he said because they were in his mark. Now, although they were not in his mark, and although the mark was immaterial, yet, as that was the medium through which the witness arrived at his knowledge of the important question, it had a direct tendency to strengthen his testimony, and was, therefore, material. So in the present case, if the defendant's situation had given him a better opportunity of becoming acquainted with the material point in the case, testimony to that fact might have been considered material. Thus, if the question had been whether Carter had made a good crop that year, or whether his overseer had done his duty, his testimony to those points might have been strengthened by the fact of having lived near him ; because it furnished him with the means of knowing with more certainty the truth of those facts. But it is not so with the case now under consideration. The material fact was, whether Carter actually sold the cow to Shackelford. If the defendant lived a hundred miles off and was present at the sale, he was a competent witness to prove it. If he lived within fifty

yards and was not present, he could know nothing of the matter. It was not a fact of such a nature as to be better known to him in consequence of the contiguity of residence. It may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness to a more material point in a case; and perhaps no precise and definite rule can be laid down on the subject. In all cases, therefore, so highly penal, where the question is of a doubtful character, I should incline to favor the side of the accused. In the case now under consideration I cannot conceive that the testimony was either directly or indirectly material to the issue."

A person commits perjury not only by swearing falsely to a fact actually in issue, but also when the fact, though not in issue, has a tendency to prove or disprove this fact. But it must be "of some consequence to the point in question."

"If," said Lord Holt, in an old case, "it be a matter that tends to the discovery of truth, though but a circumstance, as that such a one wore a blue coat when he wore a red, it is perjury; but if he tells an impertinent story, nothing to the purpose, then it is not so." *Rex v. Greip*, 12 Mod. 142. Herein is the test: If the lie can have no influence at all on the question, one way or another, no one suffers from it, and the law does not notice it or punish it. For, as a matter of fact, it is difficult to imagine a case in which a person would be under any temptation to lie about a matter not material in some way or other to the issue, or "of some consequence to the point in question."

A fact may be "material," though evidence of its existence was improperly admitted. Annie Bishop, having charged one Harmer with being the father of her illegitimate child, was asked on the examination, if she had ever had connection with any one else. She denied it. Then Edward Gibbon stepped forward and testified that she must have overlooked the time he and she were engaged in that very act. Edward being subsequently tried for perjury, in telling such a story, it was held that although his evidence had

been improperly admitted—that is to say, his story should have been ruled out for being legally inadmissible—yet he was guilty just the same of perjury in telling a lie about it. *Reg. v. Gibbon, L. & C. 109.*

OBSTRUCTING LAWFUL ARREST.**REG. v. BROWN.**

[1 Cr. & M. 814.]

Policeman Herbert was no coward. A prize-fight being in full sway, in the presence of four hundred spectators—hard customers, too, some of them, we may be sure—Herbert pushed his way into the ring and attempted to arrest the bruisers. But he was incontinently hustled back over the ropes, and when he proclaimed that he was a police officer, the crowd only laughed at him, and told him to go home. Herbert then called on several of the spectators to help him arrest the fighters; but, it is needless to say, got no response. He had to give it up; but, the next day, Mr. Brown, who was one of the parties who laughed when the policeman tried to enlist them in his service, found that he was charged with obstructing an officer in the execution of his duty.

Mr. Brown pleaded “not guilty.” The judge, after telling the jury that it was a very important matter that a citizen should assist the officers of the law when asked to preserve the public peace, said that if they were satisfied of the following three things, they would have to convict him:—

1st. That the constable saw a crime being committed, or had a warrant for a crime that had been committed.

2d. That there was a reasonable necessity for the constable calling upon other persons for their assistance

and support. "In this case there is no doubt that the constable could not by his own unaided exertions have put an end to the combat.

3d. That Brown was called on for his assistance, and, without any physical impossibility or lawful excuse, refused to give it. "Whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question or the criterion. Every man might make that excuse, and say that his individual aid would have done no good; but the defendant's refusal may have been, and perhaps was, the cause of that of many others. Every man is bound to set a good example to others by doing his duty in preserving the public peace."

And the jury having found these facts, Brown was convicted.

To prevent the arrest of a criminal, or to obstruct an officer of the law in the discharge of his duty, has always been considered an offense, provided the officer had authority to make the arrest, and the party knew he was an officer. The case above is interesting, as showing that not only positively obstructing an officer, but also refusing to aid him in the execution of his duty, is a crime.

ESCAPE.**STATE v. LEWIS.¹**

[19 Kan. 266.]

Law — Paw — Guilt — Wilt.— When upon thy frame the law—
places its majestic paw— though in innocence or guilt — thou
art then required to wilt.

Statement of case by reporter.

This defendant while at large
Was arrested on a charge
Of burglarious intent,
And direct to jail he went;
And he somehow felt misused
And through prison walls he oozed,
And in some unheard of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw
Like a hand of iron mail
And resocked him into jail,
Which said jail while so corralled,
He by sockage tenure held.

¹ This case was reported by Eugene F. Ware, Esq., of Fort Scott, Kansas, by whose permission I am able to print this poetical version of the decision exactly as it may be found in the nineteenth volume of the Kansas Reports at page 266.

Then the court met and they tried
Lewis, up and down each side,
On the good old-fashioned plan;
But the jury cleared the man.

Now you think that this strange case
Ends at just about this place!
Nay not so. Again the law
On defendant placed its paw.
This time takes him round the cape
For effecting an escape.
He, unable to give bail,
Goes reluctantly to jail.

Lewis tried for this last act
Makes a special plea of fact:
“Wrongly did they me arrest,
“As my trial did attest;
“And while rightfully at large
“Taken on a wrongful charge,
“I took back from them, what they
“From me wrongly took away.”

When this special plea was heard,
Thereupon, the State demurred.

The defendant then was pained,
When the court was heard to say,
In a cold, impressive way:
“The demurrer is sustained.”

Back to jail did Lewis go,
But as liberty was dear,
He appeals, and now is here
To reverse the judge below.

The opinion will contain
All the statements that remain.

Argument and brief of appellant.

As a matter, sir, of fact,
Who was injured by our act
Any property or man?
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped up charge,
And if we escape then say
It is *crime* to get away,
When we rightfully regained
What was wrongfully obtained?

Please the court, sir, what is crime?
What is right and what is wrong?
Is our freedom but a song
Or the subject of a rhyme?

Argument and brief of attorney for the State.

When the *State*, that is to say,
We take liberty away,
When the padlock and the hasp
Leaves one helpless in our grasp,
It's unlawful then that he
Even *dreams* of liberty;
Wicked dreams that may, in time
Grow and ripen into *crime*.
Crime of dark and damning shape;
Then if he perchance escape,
Evermore remorse will roll
O'er his shattered sin-sick soul.

Please the court, sir, how can we
Manage people who get free?

Reply of appellant.

Please the court, sir, if it's sin,
Where does turpitude begin.

Opinion of the court — PER CURIAM.

We—don't—make—law. We are bound
To interpret it as found.

The defendant broke away,
When arrested, he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below ;
And we nothing can infer.
Let the judgment be sustained.
All the justices concur.

Note by the reporter.

Of the sheriff — rise and sing,
“ Glory to our earthly king.”

The poet who remarked that stone walls do not always constitute a prison nor iron bars make a cage, was right. The tendency of one who is immured in jail is to get out if he can — therefore the law to supplement bolts and locks by fear of punishment, makes the effort of the prisoner to regain his liberty a crime. Such efforts are popularly known as breaking jail, but in the law they are termed either *escape*, *prison breach*, or *rescue* as the case may be. Where the party's liberation is effected by himself alone, or with the assistance of others, without force (as where he smuggles himself out as Napoleon did out of the fortress of Ham), it is called an *escape*; where it is effected by the party himself with force (as where he breaks the bars or digs a tunnel as Edmond Dantes did in the Chateau D'If), it is called a *prison breach*; and where it is effected by outside parties with force (as the Fenian prisoners were rescued by their confederates in Birmingham) it is called a *rescue*. Mr. Justice Stephen gives these il-

lustrations of the distinction. A., lawfully confined on a charge of felony climbs over the prison wall and escapes. B., who is in the same box, on the same charge, escapes with A., but not being as good a climber disturbs and throws down some loose bricks on the top of the wall. B. is guilty of prison breach while A. is guilty only of escape. The difference is very material, for an escape is but a misdemeanor while a prison breach is a felony.

In all the cases the imprisonment must be a lawful one, but it is immaterial (as Mr. Ware's poem shows) whether the prisoner be guilty or innocent.

BRIBERY.**STATE v. PURDY.**

[86 Wis. 213]

The office of county judge of Vernon County, Wis., was not much of a sinecure, and the salary was but \$1,000 a year. Nevertheless, Mr. Newell, who was a candidate at the election to fill the office, wanted it very badly. He wanted it so badly that he issued a notice to the electors that if he was elected he would do all the work for \$700 and return the other \$300 into the county treasury. The citizens of Vernon County were not averse to saving expenses in this way, and they returned him at the head of the poll. But when the case was brought before the Supreme Court of the Wisconsin, the judges did not regard Mr. Newell's offer in the light that the electors did. They declared it bribery, and Mr. Newell had to step down and out. "We will not hold," said the judges, "that a man may buy a public office, especially a most important and responsible judicial office, just as he would buy a horse at auction, that is by offering to pay more for it than any other person is willing to pay."

Bribery may be defined to be hiring or being hired to swerve from public duty. To offer money or other reward to a judge or a member of Congress, or the legislature, or any public officer, to influence his action against his duty is bribery in the offerer; and if

the officer accepts it for that purpose it is bribery in him. The above case shows that voting by an citizen at a election is a public duty within this rule.

Embracery is a species of bribery. It consists in an attempt by corrupt means to induce a juror to give a partial verdict. A juror may be guilty of embracery in corruptly influencing his fellows.

*COUNTERFEITING***UNITED STATES v. KING.**

[5 McLean, 208.]

A sleight of hand performer had made some half dollars and quarters to use in his tricks. He was indicted for counterfeiting. But the court held that his act did not come within the law and he was acquitted. "The statute," said the judge, "contemplates no other intent in the act of making as necessary to constitute the crime, but that of disposing or passing the spurious coin as true and genuine. If made for any other purpose—though that purpose is not a justifiable or defensible one in a moral aspect, the party does not incur the legal guilt contemplated by the statute."

Counterfeiting is the making of any false coin like the genuine coin with intent to defraud. It is punished by statutes of the United States, as the national government alone coins money. From the possession of counterfeit coin, and instruments for making it, the presumption arises that the coin was made by the person in whose possession it is found.

It is a very necessary element in the crime of counterfeiting that the false coin should "resemble" the true one. The test is, does the counterfeit look so much like the original as to deceive a person using ordinary caution? So where a man had in his possession and tried to pass a metal piece the size and color of a half sovereign, having a different legend and inscription, but with a similar head of the Queen, it was held that he was guilty. *Reg. v. Robinson*, L. & C. 604. On the other hand, where one Morrow made some pewter pieces to imitate half dollars, but so bad that the first one he tried to pass, by the hand of a small boy, was instantly de-

tected, it was held that the counterfeiting was not established. "The piece attempted to be put off," said the court, "is of pewter, very light, and, as it seems to us, is in all respects a miserable imitation of the genuine half dollar." *U. S. v. Morrow*, 4 Wash. C. C. 738.

DISTURBING RELIGIOUS WORSHIP.

STATE v. LINKHAW.

[69 N. C. 214; 12 Am. Rep. 645.]

The defendant was indicted for disturbing a religious congregation. He was a strict member of the Methodist Church, and a man of exemplary deportment, but he sang in such a way as to disturb the congregation. The disturbance consisted partly in his holding on the notes after the other singers had let go. He was evidently trying to realize Milton's idea of "linked sweetness long drawn out." The disturbance was decided and serious. "The effect of it was to make one part of the congregation laugh and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." Once the preacher had shut up the book and declined to sing the hymn. The presiding elder had refused to preach in the church on account of the disturbance. On one

occasion "a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing," and he then refrained. On many occasions the church members and authorities expostulated with him on account of his singing, and its disturbing effects, but he invariably replied that "he would worship his God, and that as a part of his worship it was his duty to sing." One of the witnesses, being asked to describe his singing, sang a verse in his voice and manner which "produced a burst of long and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court."

The jury found him guilty; but this was reversed, because there was no proof or pretense of any intention to disturb the worship, but, on the contrary, it was admitted that he was conscientiously taking part in the religious services, and doing his "level best."

Among other high crimes against the public are certain offenses against religion, such as *Apostacy*, *Blasphemy*, *Disturbing Religious Worship*, *Profane Swearing* and *Sabbath Breaking*.

Apostacy was the renunciation of religion by one who had previously embraced it. It was a crime against the church, and the church and the state being allied, the common law punished whatever might injure or degrade it. In America there is no state church, and, therefore, there is in the United States no such crime noticed by the law.

Blasphemy is speaking evil of sacred things. In earlier times, when men's opinions had to conform very strictly to the established order of things, there were frequent trials for this offense, and it was held that to write against Christianity at all was blasphemous.

But at the present time, and especially in this country, a more liberal spirit prevails, and now the principles of the Christian religion or its sacredness or genuineness may be debated in private or in public by all who will. There is, nevertheless, in all the States such a crime as blasphemy; but the law is not now put in force unless the attack is of the most extravagant nature—so extravagant as to show the utmost malice in the utterer, and to be an injury to public morals.

Disturbing Religious Worship is indictable at common law. The law will not permit the worship of a whole congregation to be interrupted by an individual, even though the individual may think he is only exercising his rights. Let him settle his disputes, say the courts, outside the church, and after the service is over. Mr. Ramsay, who had been expelled from the Pine Street Church a fortnight before Christmas, determined to speak right out in meeting and to let his wrongs be known. So, after the congregation had assembled on Sunday morning, and the first hymn was just finished, he rose up in his place and began to relate to the people his side of the case. The minister tried to shut him up; but he declared he would be heard, and had to be forcibly expelled before the service could go on. It was held that Mr. Ramsay was guilty. "No one," said the court, "has a right to interfere with the religious devotions of others by making known his own grievance, real or fancied, in so boisterous a manner as to disturb and finally break up the meeting altogether, and thus frustrate the object for which it was held; and he can not be heard to say he did not intend the obvious and necessary consequences of his conduct." *State v. Ramsay*, 78 N. C. 450. Of course any wanton and contemptuous conduct is clearly within the law; as laughing, or swearing, or cracking nuts, or the like. *Hunt v. State*, 8 Tex. (App.), 116.

A member may disturb the worship as well as an outsider, and even when he is given permission to speak he may exercise his right in such a violent and outrageous way as to render himself guilty of this offense. One Sunday morning after prayer, Mr. Lancaster, of Randolph, Alabama, having obtained leave of the preacher in charge to say a few words, rather astonished the hearers by this speech: "I neither rise to preach, pray, or sing; but I want to talk to the church. I have meditated, thought, and prayed to know what I ought to do. I demand my letter. I cannot live in the church with liars, thieves, rogues, and murderers." This was

hardly complimentary to his fellow-members, and naturally caused much commotion. I presume Mr. Lancaster got his letter; at any rate, he was indicted at a subsequent session of the court for disturbing religious worship. "A member of the assemblage, though he be a member of the particular religious organization having control of the services, is bound to regard its peace and order. No permission given him to speak, or given to a mere stranger, by the leader or conductor of the services, whether he be lay or clerical, can justify or excuse such discourse as is unbecoming the assemblage, and must, by its violence, offend the order and decorum essential to Christian worship." *Lancaster v. State*, 53 Ala. 898. From all which it appears that the saying that the preacher is the only man that has it all his own way — can say anything he likes without being afraid of being contradicted — is, so far as within the church is concerned, very true. I wonder whether the preacher would be indictable in any case? Probably he would if he unnecessarily dwelt on the sins of his hearers in a personal way until they should make for the door, or should call him to order.

But Mr. Linkhaw's case shows that where a person does a thing he has a right to do, without any intention of disturbing the meeting, he is not guilty of any offense. I take the report of Mr. Linkhaw's case from Mr. Irving Browne's "Humorous Phases of the Law," (San Francisco, Sumner Whitney & Co., 1882) a book which I advise the lawyer to lay in for his next vacation. Mr. Browne's comments on several other cases of this kind I cannot refrain from borrowing in this place, as they are so much better than anything I can attempt. "In *Brown v. State*, 46 Ala. 175, it is held in effect that one is not punishable for being in undue haste to get to church. Before service commenced the defendants came by on horseback on a gallop some fifty yards from the church, and just then the defendant, Weems, who had been riding behind and was just catching up, called out to the others, 'You have been ahead of me all night, but damned if I am not up with you now.' When they went through the church yard they checked their pace. Afterward they came into the church, and one of them lay down on a rickety bench which made a noise every time he moved. The case does not disclose whether the defendant was moved thereto by the dullness of the sermon. It also appeared that one of the defendants had caught a cow by the tail, up the road, causing her to jump and ring her bell. But even this might have been an innocent mistaking of the cow's tail for the church bell rope, and a desire to

summon the worshipers. At all events the whole party escaped without punishment, on the ground that there was nothing willful in their conduct. * * * Disturbing the sleep of religious people after they come from service, is not within the statute. Thus held in *State v. Edwards*, 82 Mo. 550, where the acts complained of took place at a camp meeting, at night, after the assembly had dispersed, and the people had retired to their virtuous couches. The contrary, however, was held in *Jennings' Case*, 8 Gratt. 624, where Israel having retired to their tents at night, the wicked defendant purloined the tin horn from the preacher's stand, where it was kept to assemble the faithful, and proceeded to make night hideous by enacting the part of Gabriel. But the whole congregation need not be disturbed. It is sufficient if the thoughts of a single worshiper are distracted from divine things. So it was considered in *Cockreham v. State*, 7 Humph. 11, where one profane person cursed during meeting, in the private ear of an individual Methodist. The congregation must not be disturbed in detail. * * * And, although the services are over, if the congregation have not actually dispersed but are in the act of dispersing, it will not answer for any one to curse, swear, fight or throw rocks in the church yard (*Williams v. State*, 8 Sneed, 318), although we know from observation that a little quiet horse swapping in the same place is not objectionable. Even if the congregation assembled for worship have dispersed, still an assembly of the church authorities, for the trial of a member immediately after the service, is held privileged from disturbance. *Hollingsworth v. State*, 5 Sneed, 518. It is not easy to see how such an assembly can be construed 'a congregation assembled for the worship of the Deity.' It is oftener an assembly for the purpose of 'raising the devil,' and it is generally as difficult to disturb it as it would be to disturb an average political caucus." p. 260.

Profane Swearing. The law punishes the violation of the third commandment — provided that the language is used in the hearing of others, and is continued. A man may swear till his throat is sore, but if no one hears him it is no crime; and so a person can not be convicted for a single "damme." Profane swearing may be irreligious; it certainly is coarse and vulgar; but unless it is kept up so as to be a nuisance to those who are obliged to hear it, it is not punishable. For instance, the way our army swore in Flanders, according to Uncle Toby, was not a circumstance to the swearing done by Stephen Powell, in the town of Lumberton. But being indicted, he found a loophole in the indictment to escape through

"It is charged only," said the court, "that he cursed and swore publicly in the street; but whether in a whisper or aloud; once or repeatedly; for a moment or an hour; or whether heard by any or many, is not charged." *State v. Powell*, 70 N. C. 68.

*SABBATH BREAKING.***WILKINSON v. STATE.**

[59 Ind. 416; 2 Am. Cr. Rep. 596.]

On his farm, twenty-six miles from the nearest market, Wilkinson raised a great many melons. The melon season, like the sugar-making season, is short, depending on the climate and the weather. The summer of 1877 had crowned his labor with a bounteous harvest; the melons were ripening and decaying much faster than with the facilities at his command he could get them to market, for he could only haul a load to market every two days. One Sunday in August, there were five or six hundred melons in the patch, dead ripe and ready for the market. A ripe watermelon is a luxury, but a decayed melon may be said to be "stale, flat, and unprofitable." Under these circumstances, Wilkinson, on Sunday morning, loaded his wagon with melons and started for market.

"A gent has 'as 'is hi on 'im,
I think can make some sport."

hummed a jealous neighbor who watched the proceeding. The next day the jealous neighbor had Wilkinson indicted for breaking the Sabbath, and the question came before the judges, whether what he did was a work of "necessity," and so, excusable.

The judges all agreed that it was. "It was his duty as a prudent and careful husbandman," said they, "to labor diligently in getting as many of his melons as he could into market, so that the fruits of his toil might not be wasted or suffered to decay. Whatever it was his duty to do, there was moral necessity for him to do. And in the accomplishment of the main purpose, of saving and securing the benefit of his crop of melons, whatever labor he was reasonably required to do on Sunday, must be regarded, as it seems to us, as a work of necessity."

And they added that the fact that by getting up at midnight on Sunday night, and driving all the rest of the night, he could have reached the market on Monday morning, did not make his going on Sunday any less a work of necessity. "It is not necessary to the protection of the Sabbath that men should abuse or over-work either themselves or their horses by midnight labor; and, in our opinion, it is no desecration of the Sabbath to garner and secure on that day the fruits of the earth which would otherwise decay or be wasted."

Sabbath breaking was indictable at common law, and is, in most of the States, the subject of statutory enactment. For example, the Missouri statute is as follows: "Every person who shall either labor himself or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, or shall be convicted of horse-racing, or cock-fighting, or playing cards, or shall expose to sale any goods, wares, or merchandise, or keep open any ale house on that day shall be deemed guilty of a misdemeanor and fined fifty dollars." R. S. Missouri, §§ 1578-1581. Of similar import are the statutes of

the other States. A glance at any of our large cities on the Sabbath will, however, show that these statutes are only enforced where public opinion is overwhelmingly in favor of Sunday laws.

The evening after sunset is a part of the Sunday within the statute. *Com. v. Newton*, 8 Pick. 284.

Works of necessity and charity are expressly excepted in all the statutes on the subject. A liberal construction has been given to the phrase "work of necessity." It is not necessary that it should be a physical or absolute necessity; a mere moral necessity is enough, as, for example, going to church on Sunday in a carriage driven by a servant. *Com. v. Nesbit*, 84 Pa. St. 898. "Necessity, itself," said Chief Justice Lowrie, in this case, "is not capable of any sharp definition. What is a mere luxury, or, perhaps, entirely useless or burdensome to a savage, may be a matter of necessity to a civilized man. What may be a mere luxury or pleasure to a poor man, may be a necessity when he has grown rich. Necessity, therefore, can itself be only approximately defined. *The law regards that as necessary which the common sense of the country in its ordinary modes of doing its business regards as necessary.*"

Acting on this, it is held in Indiana that selling cigars on Sunday may be a "work of necessity" within the statute. This is good news for smokers. The defendant was a clerk in a hotel, and on Sunday morning, after breakfast, sold a cigar to a guest. The court said: "There is a difference between a work which may be done on one day as well as another and which is not a daily need, and a work necessary to supply a constant daily want. There is no necessity for working in a shop, ploughing a field, selling from a store, opening an office, going to the exchange or mart of commerce, or working at any common labor or usual avocation on Sunday, but there is a daily necessity for putting a house in order, cooking food, taking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any other lawful habit on Sunday, the same as there is upon a week day; and whatsoever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the fair meaning of the law under consideration." *State v. Carver*, 69 Ind. 61. I know one judge who would not have concurred in this opinion had he been on this bench; for, in his opinion, the use of tobacco is no more a necessity than the use of wampum. All of which goes to show that what is or is not a necessity will depend on, not the length of the chancellor's foot, but the state of his liver, for I know another judge who considers a morning cocktail

a "necessity;" on the other hand, the Scotch and Canadian courts do not think a shave on Sunday a necessity, and fine barbers for keeping open on the Lord's Day. But it may be said that in most of the States, the courts will bring a charge of Sabbath-breaking within the exception, if they can.

*ADULTERY.***COLLINS v. STATE.**

[14 Ala. 608.]

Tom Collins was indicted for living in adultery with Polly Williams. It was proved that although Tom had a wife at home, yet at least one night every week he used to go over to where Polly lived, and stay with her till morning. He kept this thing up until the neighbors commenced to talk, and the result of their talking was this indictment. Tom's plea was simply that he did not "live," but only occasionally, so to speak. But the court decided that his acts came within the statute. "It is not an indispensable element in the offense," said Collier, C. J., "that he should have abandoned his own home and taken up his abode with the adulteress, or that he should have taken her to his house, made her supreme in his affections, and excluded his wife from the conjugal bed. The sleeping under the same roof and in the same bed at stated nights must be regarded as a *living together*, within the language and intention of the statute. Such a course of conduct persevered in for such a length of time must become open and notorious, and so far as the outrage upon decency and morality is concerned, can be little less objectionable than making her the partner of his own bed and board. If the offense charged had been

an occasional act of criminal intimacy it would be punishable only *in foro conscientiae*,—municipal justice could not reach it. But the evidence of guilt went far beyond this, and sustains the verdict."

The great difference should be noted between the proper meaning of the word "adultery," and the meaning put upon it by legislators in enacting statutes for the punishment of immorality. At common law, adultery is nothing more than carnal intercourse by a married woman with a man other than her husband, be he married or unmarried. The gist of the crime consists in the injury to the husband by exposing him to have another man's children to support during his life and to provide for after his death. Therefore an unmarried woman could never be guilty of adultery, nor even a married man by having unlawful connection with a single woman. If the woman be single, her incontinence produces none of the evils spoken of,—her issue takes away no man's inheritance; it can be heir to nobody, and the burden of its support is cast by law upon herself and the partner of her guilt. Even if her paramour be a married man, it is not adultery, and for the same reason; for the bastard can not succeed to his inheritance or that of his lawful wife. Therefore, at common law,—as in England at this day,—a divorce on the ground of adultery can only be obtained by the husband; and the common-law action of adultery did not lie at the suit of the wife. This is also the biblical meaning of the term "adultery,"—in the seventh commandment, for instance. *State v. Lash*, 1 Harr. (N. J.) 880. The "woman" taken in adultery, is one of the characters of the Bible; the "man" I fail to find mentioned. Yet I am not aware that either the Jews or the Gentiles of that day were particularly distinguished for morality.

In most of the States, however, the legislature, desiring to render incontinence in the man punishable by law, have defined the term to include illicit intercourse: (1) by a married woman with any man not her husband; (2) by a single man with a married woman; and (3) by a married man with any woman not his wife. When neither party is married, the word "fornication" is used in the statutes to describe illicit intercourse. But though "adultery"—i.e., a single act of unlawful intercourse—has in some States been made a criminal offense, it is generally only "living together in adultery" which is punishable. And this, as has been frequently held, does not include a single act, or even a number of

acts. In a Texas case, where a man and woman were indicted under a statute making it an offense for a man and woman to "live together in adultery or fornication," it appeared that the parties had had criminal intercourse a half dozen times or so; that the woman lived with her husband, and that the paramour visited her on the sly whenever he got the chance. It was held that the case was not within the statute. *Richardson v. State*, 87 Tex. 346. But, as was held in Tom Collin's case, it is not necessary that the parties should live together all the time,—it is enough if the relation has become established as a permanent one. It should be said that the object of such statutes is not so much to prevent fornication as to prevent and punish the living together of people as man and wife who are not married.

BIGAMY—FIRST MARRIAGE MUST BE LEGAL.**SHAFHER v. STATE.**

[20 Ohio, 1.]

Johnny Shafher was in a great hurry to be married. He could not wait till he was sixteen years old, but three months before the sixteenth anniversary of his birthday he married Elizabeth Emerick. In less than a year he was tired of it all, and went back to his father. A year later this uxorious youth married another girl, Amanda Fitz. Elizabeth very properly was angry and had Johnny indicted for bigamy.

But the court held that a marriage under sixteen was void; and this being so, he had never been married at all until he married Amanda, and could not, therefore, be guilty of bigamy.

Bigamy is the offense of having more than one husband or wife at the same time. It is also, and perhaps more properly, called polygamy. It is the second marriage only that is criminal, and, therefore, as held in the case above, if the first marriage is void the offense is not committed by marrying a second time. But if the first marriage is simply voidable, the second marriage is criminal.

For the same reason, *i.e.*, that it is the second marriage which is criminal, if the first marriage took place in one State and the second in another, the bigamist can only be prosecuted in the latter State. One Mosher married a wife in Pennsylvania, and after deserting her went to Canada, and there married another woman, his first wife being still living. He brought wife No. 2 to New York, where he was arrested for bigamy. It was held that he could not

be tried in, or convicted in, the State of New York. *People v. Mosher*, 2 Park. 195.

A divorce from the first marriage is, of course, a defense, unless it was obtained by fraud, or from a court that had no jurisdiction of the parties, or unless the decree has enjoined the party from marrying again.

BIGAMY—SECOND MARRIAGE MAY BE VOID.**REG. v. BRAWN.**

[1 C. & K. 144.]

Jane Colbert married Thomas Brawn. But she had been Mrs. Brawn barely three years when she left Thomas. The single state was evidently not to her taste, for it was not more than a year before she stood at the altar again with another Thomas. Thomas II.'s name was Webb, and he was the husband of her deceased sister, Mary Ann. If her first Thomas had been deceased too, all would have been well; but, unfortunately, he was alive, and one day stood up in court and charged her with bigamy.

Now, as a marriage with a deceased sister's husband was void in England when these things occurred, Jane had no fear but that, like Johnny Shafner, she would get off. But she was mistaken. "The validity of the second marriage," said Lord Denman, C. J., "does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was not in itself prohibited, and therefore null and void, does not signify, for the woman having a husband then alive has committed

bigamy by doing all that in her lay to enter into marriage with another man."

And Thomas Webb did not escape either. The jury having found that he knew Jane was already married, he was convicted as an accessory before the fact.

At first glance it may seem difficult to distinguish Mrs. Brawn's case from young Shafner's. When it is remembered that the crime of bigamy consists in *going through the form of marriage* by a party *already married* the distinction is obvious. Mrs. Brawn was already married; Shafner was not, his first marriage being void. On the other hand, though Mrs. Brawn's second marriage was void, yet she *went through the form*, and this was enough. In an English case Eliza Brown, not wanting to be known as the woman who was going to marry John Penson, who had another wife living, had her name put as Eliza Thick in the banns. When John was subsequently indicted for bigamy his counsel called the court's attention to the law that a marriage under an assumed name was void. "That applies," replied the judge, "only to the first marriage, and I am of opinion that parties can not be allowed to evade the punishment for the offense of contracting a concerted, invalid marriage." And John was sent to jail. And the same was held where the second marriage was between parties unable legally to marry on account of consanguinity — uncle and niece (Queen *v.* Allen, L. R., 1 C. C. R. 367), and race — as negro and white person. People *v.* Brown, 84 Mich. 839.

UNLAWFUL ASSEMBLY.

REX v. BRODRIBB.

[6 C. & P. 571.]

Brodrribb and sixteen other poachers met at a house one night to prepare for an expedition, and after blackening their faces so as to be disguised, Brodrribb made them take an oath of secrecy. The law prohibited any one from administering an oath concerning an unlawful assembly, and Brodrribb was subsequently indicted. The judges held that this was an "unlawful assembly." It was impossible, said Holoyd J., that a meeting to go out with faces thus disguised at night and under such circumstances, could be anything else than an unlawful assembly.

An unlawful assembly is a mere meeting of persons, three or more in number, to disturb the peace in a tumultuous manner or to do an unlawful act. In *Reg. v. Vincent*, 9 C. & P. 109, Baron Alderson explained the law as to unlawful assemblies in a very clear and concise manner. "I take it," said he, "to be the law of the land that any meeting assembled under such circumstances as according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood is an unlawful assembly. You will have to say whether, looking at all the circumstances, these defendants attended an unlawful assembly, and for this purpose you will take into your consideration the way in which the meetings were held, the hour of the day at which the parties met, and the language used by the persons assembled and by those who addressed them. Every one has a right to act in such cases as he may judge right, provided it is not injurious to another; but no man, or number of men, has a right to cause alarm

to the body of persons who are called the public. You will consider how far these meetings partook of that character, and whether firm and rational men having their families and property there, would have reasonable ground to fear a breach of the peace, for I quite agree with the learned counsel for the defendant, that the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage."

Nearly allied to this offense are the offenses of *rout* and *riot*. See *State v. Sumner*, *post* 1, p.180 and *State v. Brazil*, *post*, p. 182. The difference between these three crimes has been illustrated thus: A hundred men armed with sticks, meet together at night to consult about the destruction of a fence which their landlord has erected—this is an *unlawful assembly*. They march out together from the place of meeting to the direction of the fence — this is a *rout*. They arrive at the fence, and amid great confusion, violently pull it down — this is a *riot*. *Harris, C. L.* 93.

*ROUT.***STATE v. SUMNER.**

[2 Speers, 599.]

General Daniel Wallace, of the village of Union, and State of South Carolina, being duly sworn deposed as follows: "I am a justice of the peace. I was going down the main street of the village one afternoon when I saw a great crowd assembled. I asked what was going on and was told by a by-stander that a prize-fight was about to take place between Scales and Faucet for \$100 a side. Looking through the crowd I saw the combatants with their heads shaved, and the money ready staked. The crowd was very much excited. I never saw such a tumult in the village before. I, as a magistrate, immediately interfered and announced that the fight should not take place. Scales said he did not wish to do anything that was illegal, but Faucet's second said that they should fight if they liked — nobody should crowd him, if he knew himself. I then went to my office, but the tumult increasing I went back and saw that everything was ready for the fight to commence. I then called on the officer and they arrested the principals and their seconds."

It was held on this evidence that the parties arrested were guilty of *rout*. "The parties," said Butler, J., "had, no doubt, assembled with a common intent to commit a breach of the peace. Preparations had been

made for the combat, and blows only were necessary to constitute the offense of riot beyond all doubt. What degree of execution of their purpose will convert a rout into a riot, it may be often difficult to determine. But this case does not require any such distinction to be made. The preparatory battle, the staking of money, will clearly make them guilty of a rout."

A rout as we have seen (*ante*, p. 129), is an unlawful assembly, which proceeds to execute its unlawful object, but does not actually execute it. As Sumner's Case shows, it differs from a riot only in the circumstance that the enterprise is not actually carried out. Mr. Justice Stephen gives this apt definition. "A rout is an unlawful assembly which has made a motion toward the execution of the common purpose of the persons assembled," and illustrates it thus: A. B. and C. meet at A.'s house for the purpose of beating D. who lives a mile off. They then go together to D., and there beat him. At A.'s house the meeting is an unlawful assembly; on the road it is a rout, and when the attack is made upon D. it is a riot.

RIOT.

STATE v. BRAZIL.

[Rice, 257.]

A band of young roysterers in the town of Fairfield, who dubbed themselves the "dog-tail dragoons," and thought it great fun to make night hideous with their noises, marched through the streets after dark, shooting guns and pistols, blowing horns and uttering unearthly yells. The citizens, especially the females, were pretty thoroughly scared, and lost no time when the day broke in finding out the parties and bringing them to court.

The roysterers were convicted of riot. The court said that their conduct had, very naturally, alarmed the citizens. "If," said Evans, J., "a tumultuous or noisy act be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot—as if a dozen men assemble together in a forest, and blow horns or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight in the streets of Charleston or Columbia, and were to march through the streets crying fire, blowing horns, and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot, although there might be no ordi-

nance of the city for punishing such conduct, and why? Because such conduct in such a place is calculated to excite terror and alarm among the citizens. Lord Holt says, if a number of men assemble with arms *in terrorrem populi*, although no act be done, it is a riot. On the same principle an indictment was sustained for riotously kicking a foot-ball in the town of Kempton. It was an amusement, but accompanied with such circumstances of noise and tumult as were calculated to excite terror and alarm among the inhabitants of the town."

A riot is a tumultuous disturbance of the peace by three or more assembled to carry out an intent, and afterwards actually carrying out the same to the terror of the people.

It is necessary to constitute a riot that three or more persons be engaged. For two persons to fight with each other on the street is not a riot. And the three must do the same act—by this being meant, they must be engaged in the same intention. In tearing down a house, for example, one rioter breaks down a door, another knocks in a window, a third hands a crow bar. Here they of course do individual acts of different kinds, but they are all caused by the common intent to demolish the house. We have seen that the riot is the third step—the execution of the intention. *Ante*, p. 181. But the doing of any one act in consummation of the intention is sufficient to make the rout a riot, even though the whole purpose is not carried out. Some parties in Maine having assembled to ride an obnoxious citizen on a rail, seized him and were starting him off when he was rescued by his friends. Nevertheless they were considered guilty of riot. *State v. Snow*, 18 Me. 346.

At common law, a rout and riot must proceed from an unlawful assembly, and the test in the first is the progress made in the execution of the design for which the last came together. Under some American statutes it has held, however, that to constitute a riot there need not have been an unlawful assembly in the first instance—and, therefore, it is sufficient under such statutes to constitute a riot that two or more persons being together, should do an unlawful act with force or violence against the person or property of another. *Dougherty v. People*, 5 Ill. 179.

An *affray* is the fighting by mutual consent of two or more persons in a public place to the terror of the people. The place must be *public*, and, therefore, a field surrounded by a dense wood, a mile away from any highway or other public place, does not lose its private character by the casual presence of three persons, two of whom engage in a fight. *Taylor v. State*, 22 Ala. 15.

CONSPIRACY— TO DO ACT NOT CRIMINAL.

SMITH v. PEOPLE.

[25 Ill. 17.]

Two men and a woman living in Chicago agreed to procure a girl named Lizzie Engles to have carnal connection with a certain man. They used no violence, but by coaxing and presents, they endeavored to accomplish their purpose. They failed, however, and as individually they had committed no crime, the three were indicted for conspiracy. And in this way they were sent to the penitentiary.

“It is,” said the chief justice, “indictable to conspire to do an unlawful act by any means, and to conspire to do any act by unlawful means. * * * What is an unlawful act? If the term unlawful means criminal or an offense against the criminal law, these parties are not indictable, for seduction is not by our laws punishable as a crime. But by the common law governing conspiracies the term is not so limited. * * * Conspiracies to accomplish purposes which are not by law punishable as crimes, but which

are unlawful as violative of the rights of individuals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages, beyond the damages actually sustained, have in numerous instances, been sustained as common-law offenses."

CONSPIRACY—DOING LAWFUL ACT IN UN-LAWFUL WAY.

COMMONWEALTH v. EBELLE.

[3 S. & R. 9.]

The German Evangelical Lutheran Church of Philadelphia was divided against itself. From the beginning of its organization the services had always been conducted in the German language, but as the years rolled on a party grew up in the church that preferred English. The other half of the congregation opposed it stoutly, but the advocates of English increased in number year by year. The German party, fearing that the innovation would be carried out at the next annual meeting, met together and agreed among them-

selves to fight, to defend their language with their bodies and lives, and to make blood flow if the English language was forced upon them.

The German party were indicted and convicted for conspiring to do a perfectly lawful act, viz., opposing the introduction of the English language in the church, in an unlawful way, viz., at all hazards and by violent means.

A conspiracy is a combination by two or more persons by concerted action to accomplish some criminal or unlawful purpose, or some lawful purpose, by criminal or unlawful means. The phrases "unlawful purpose" and "unlawful means," not being susceptible of an exact definition, makes this crime one of very wide extent, and a convenient trap in which to catch wrong-doers who have engaged in criminal combinations. Three classes of conspiracies are known to the law.

1. *Where the purpose is to commit a crime*, as for example, to conspire together to rob or murder, or commit a burglary.

2. *Where the purpose is lawful but the means resorted to are illegal*, for example, to combine together to support a cause believed to be just by perjured evidence, or to break into another's house in order to obtain one's own property. The German Lutheran Church case above, is a good illustration of this division.

3. *Where the purpose of the conspiracy is to effect a wrong — though not such a wrong as when perpetrated by a single individual, would amount to an offense against the criminal law.* Here, nevertheless, the conspiracy is indictable. Joel Johnson and Albert Smith agreed together to charge William Parker with being the father of a bastard child, in order to extort money from him. It was held that they were guilty. *Johnson v. State*, 26 N. J. (L.) 312. So if two or more persons agree that one of them shall be robbed by the others in order that they may obtain a statutory reward for a conviction, they are guilty of conspiracy. So, generally, to conspire to wrongfully injure or prejudice others — an individual, a body of men or the public, as the case may be, is indictable.

Smith v. People, is an excellent illustration of this division.

The agreement, the combination, being the gist of the offense, it is not necessary that the purpose should be carried out. *Hazen v. Com.*, 28 Pa. St. 855. If the conspiracy be executed, and a felony committed, the former is merged in the latter, and the parties will be indicted for the higher crime.

*NUISANCE—OFFENSIVE TRADES.***COMMONWEALTH v. UPTON.**

[6 Gray, 478.]

Cologne, though a sweet smelling name, is not a sweet smelling city. Who does not know the lines:—

The river Rhine it is well known,
Doth wash the City of Cologne;
But tell me, nymphs, what power divine
Shall henceforth wash the river Rhine.

It was, however, in Fitchburg, Massachusetts, where the scene of this odoriferous drama was laid. One Upton had built a slaughter-house some distance outside the town. For twenty years the building was used for this purpose, but during all this time the town was slowly spreading, until one day there were a lot of dwellings all around the slaughter-house, whose residents, whenever they came to the windows and the breeze was windward, put their handkerchiefs to their noses. This sort of thing could not go on long, however, and presently the neighbors had Upton

indicted for maintaining a public nuisance. He was convicted, although he urged very strongly the fact that for twenty years no one had complained.

"The public health, the welfare and safety of the community," said the court, "are matters of paramount importance, to which all pursuits, occupations and employments of individuals inconsistent with their preservation must yield. It is, therefore, immaterial, so far as the Government is concerned, in the administration of the law for the general welfare, how long a vicious practice may have prevailed or illegal acts been persisted in."

Nuisance is a very "comprehensive" word, and somewhat hard to define. I select Mr. Abbott's as one of the best definitions I have been able to find: "A general term for all the practices, avocations, erections, establishments, etc., against which the courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health or inconvenience." Abb. Law Dict. 185. Nuisances are of two kinds, *public* (sometimes called common) and *private*. A nuisance is *public* when it impairs the rights of the surrounding community generally, and it is *private* when it specially injures an individual or individuals. For a *private* nuisance an action lies by the person aggrieved, for it is a damage which the public do not share. A *private* right of action, it has been well said, lies where a person suffers *more particular damage than other people*. "If a single individual be permitted in any case to sue at law for the damage occasioned him it * * * is in those cases where he receives damage in which the public do not share. In the well established cases of special damage, where by reason of a *public* nuisance, such as stagnant water, offensive employments, illness is occasioned in the plaintiff's family, or his house is rendered uninhabitable, the injury which he suffers is exactly that which the public at large suffers, only in a different degree. It is because the stagnant waters or noisome trades are likely to cause sickness and render dwellings uninhabitable that they are deemed *public* nuisances and for continuing them an indictment would lie. But just as soon as any person finds

that his house is growing uninhabitable, that his family are being made sick, he can have a remedy therefor, and each person so situated may bring an action. So far as the public are concerned, the offensive odors constituting the nuisance injure each member thereof, but because the injury is not great enough to be felt appreciably by each one, they must all join through their common prosecutor by indictment. In the one case the damage is direct and substantial; in the other it is not. In the one case damage is incurred wherein the public do not share, and is greater than that experienced by the public; in the other all suffer alike, and each equally impreceptibly." Note in 81 Am. Dec. 133 to *Stetson v. Faxon*, 19 Pick. 147.

On the other hand a purely public nuisance cannot be made the ground of an action by a private person. In an old case (Williams, Case, 5 Coke, 78) it is said: "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance; and then it is not reasonable that a particular person should have the action, for by the same reason every one might have an action, and then he would be punished one hundred times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, then for that particular injury he shall have a particular action on the case. And for common nuisance which are equal to all the king's liege people, the common law has appointed other courts for the correction and reforming of them." The "other courts" mentioned here are the criminal courts.

The carrying on of offensive trades is indictable, whether the effect of the nuisance is to injure the public health or only disturb the public comfort. Noise or bad smells are equally the subject of such an indictment. It is essential, however, that the offensive industry should be unreasonably annoying, for there are many things—such as railroad trains—which may annoy one, but which are not nuisances by any means.

And as the community is as much benefited by useful trades, as by pleasant homes, it is often a very difficult question to say which must prevail. Must the residents put up with the industry which is offensive to them or move away, or must the manufacturer or the man carrying on the annoying business shut up shop or find another location. The answer is always determined by a consideration of the question, whose expulsion would produce the most general inconvenience, the neighbor or the nuisance? If the nuisance is essential to the community at large, if it cannot be

pushed into remoter and more desolate regions without great inconvenience, if the population affected by it can with comparatively little inconvenience retire, then the latter cannot claim that the former be expelled. Whart. Cr. L. 1440.

NUISANCE — OBSTRUCTING HIGHWAYS.

PEOPLE v. CUNNINGHAM.

[1 Denio, 523.]

Messrs. Cunningham & Harris owned a distillery on Front Street, in the City of Brooklyn. It is the custom of distillers to sell the grain remaining after distillation to draymen, and Cunningham & Harris followed the custom in this respect. In order to deliver the swill or "slops," as they are called, to the draymen, they had pipes from vats in the distillery and extending over the sidewalk, but sufficiently high for pedestrians to walk under. Persons wishing to take away the slops came with their carts and wagons, and driving under the ends of these pipes received their loads, which was let off by means of faucets in the ends of the pipes, thus conducting the contents of the vats into barrels or hogsheads standing in the carts or wagons. The vehicles, of which considerable numbers were generally waiting to be served, were formed into lines on each side of the street, frequently occupying its

center; they were driven to the place where the "slops" were discharged, and were loaded and driven off as their time came, according to the order in which they stood. A collection of teams, carts and wagons was thus accumulated at that point in the street to such an extent that it was frequently blocked up from an early hour in the morning to late in the evening, so that persons wishing to pass through the street were prevented from doing so. The persons having charge of the teams were in the habit of using coarse and obscene language, of racing, crowding and sometimes fighting for their places and to obtain precedence in getting to the spot where the commodity was delivered.

The court unanimously decided that the distillers were guilty of a public nuisance, and it made no matter that the teams, wagons, and carts were not owned by them or under their control, they having, by the manner of conducting their business, invited these assemblages in the street before their premises.

The primary object of a highway is the free passage of the public, and anything which impedes that passage, without necessity, is a public nuisance.

Even officers of the law may be as other men in this respect. Some constables in Philadelphia, having taken the goods of sundry persons on execution, put them up at auction on Fifth Street, between Chestnut and Market Streets. Some of the goods were placed on the pavement and reached as far as the curb-stone; a crowd speedily assembled, and the way was so obstructed that it was difficult for a man to pass, — the weaker sex went round without attempting to get through. Although it appeared that it had been the custom for years for constables to sell goods in just this way, the chief justice told the jury that a constable had no more

right to obstruct the passage of a public street than any other person, and the two officers were convicted. *Com. v. Milliman*, 18 S. & R. 408.

It is no answer that a man's business has grown so large that his premises are not sufficient to contain it all. In the words of Lord Ellenbrough, "He is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard; he must either enlarge his premises or remove his business to a more convenient spot." *Rex v. Jones*, 3 Camp. 280.

A temporary and necessary obstruction is, however, allowable. "This necessity," said Chief Justice Tilghman, of Pennsylvania, "need not be absolute; it is enough if it is reasonable. No man has a right to throw wood or stones into a street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand and other material may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time." *Com. v. Passmore*, 1 S. & R. 219. About the same time, the Chief Justice of England was laying down the law in almost the same words: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So, as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house, but if this inconvenience be prolonged for an unreasonable time the public have a right to complain, and the party may be indicted for a nuisance." *Rex v. Jones*, 3 Camp. 280.

An old case very like that of the Brooklyn distillers is *Rex v. Carlile*, 6 C. & P. 627, which Mr. Browne thus summarizes in a capital manner: "Mr. Carlile was a gentleman of a playful, but withal rather satirical fancy, who kept a book shop. Having been distrained on for the non-payment of a church rate, he placed in one of his windows an effigy of a bishop of the established church, inscribed 'Spiritual Broker,' and in another window a figure of a man in ordinary dress, inscribed 'Temporal Broker.' These figures attracted crowds of people to gaze at them, on Sundays as well as secular days, and the sidewalks were obstructed so that

persons were forced to walk in the carriage-way. The defendant afterward added a third figure,—that of the devil with a pitchfork, the arm of the bishop being tucked into that of the devil. He was indicted separately for the original effigies and for the satanic addition. It was proved that pockets had been picked in the crowd. Mr. Harris, a neighboring tradesman (the husband, possibly, of the fabulous 'Betsy'), swore that the crowd consisted of 'the lowest of the low,'—so low in fact that they had lowered his cash receipts £3. per day. Mr. Chandler, proprietor of the Portugal Hotel opposite defendant's shop, testified that the crowd standing over his area gratings darkened his kitchen so that the servants were obliged to burn candles all day; an injury which, of course, would be naturally uppermost in the mind of a chandler. Against this array of government, church and trade, Mr. Carlile defended himself with great humor and ability, pleading his own cause. He urged that no man should be blamed for endeavoring to attract people to his shop. He insisted that the crowd was not so great as that when His Majesty goes to the theater or to open Parliament; and inquired, 'Why do we pay for situations and disburse large sums of money annually in Fleet Street if it is not to have the opportunity of putting things in our windows to attract the attention of the customers?' He claimed that Mr. Gray was indictable for obstructing the street by means of his coach office. He referred to the two effigies, formerly at St. Dunstan's Church, which struck the quarters of the hour, attracting crowds every fifteen minutes, and complained that he was indicted for causing seventy persons to look at his effigies. 'I would ask,' he continued, 'why ought not the Lord Mayor to be indicted for the crowd that he attracts on the 9th of November every year? and if Bartholomew Fair is allowed in September, I ought not to be indicted for exhibiting effigies in October; and so far from there being anything necessarily improper in effigies, the figures of Gog and Magog used to be carried in the civic procession. It is said that the effigies exhibited by me are libelous. They are fair figures and as good as I could have made; one of them is a fair representation of a bishop; and they were meant to denote that the church, which is represented by the bishop, is not supported voluntarily, but by the law, which is represented by the broker.' At this point the reporter observed, rather acutely, that 'Mr. Carlile did not, throughout his defense, make any remark or observation on the figure of the devil.' Mr. Carlile continued,

that illuminations, military movements, and the learned judges when they go in state to St. Paul's, all attract crowds; and concluded by remarking that if his offense was indictable, 'the beautiful daughter of Mr. Very might equally have been charged with being an indictable nuisance.' This reference is explained by the reporter, who says that Mr. Very was a confectioner in Regent Street, who had a daughter who attended to his shop, who was so beautiful that a crowd of three or four hundred persons used daily to assemble and stand at his shop window for the purpose of looking at her. Police officers were obliged to be in constant attendance before his house, and the inconvenience was so great, both to Mr. Very and his neighbors, that he was obliged to send his daughter out of town. But all this availed not to the defendant. Judge Park replied that one nuisance does not justify another, and in this, he remarked, 'the learned persons who sit beside me agree with me.' He evaded the case of the procession of the judges, by saying that the crowd moved with it. Lord Mayor's day is but one day in the year, but if it lasted from October to December, he should say it ought to be put a stop to. As to Bartholomew Fair being a nuisance, he was inclined, from what he had heard of it, to suspect that the defendant was right. (Perhaps the learned judge did not know that John Locke visited that place, and that Lady Rachel, — 'that sweet saint who sat by Russell's side,' and whose memory ought to be sacred to every lawyer, — once wrote her husband that her sister had just returned from Bartholomew Fair, and 'stored us all with fairings.') The jury brought the defendant in guilty; sentence was suspended, he took down the offensive figures, and in the end was fined 40s. Now, what can the ladies hope for after this case? It is even doubtful, we see, whether their beauty would save them, for if the beautiful Miss Very had remained in town, dealing forth the sweets of her father's shop, we rather think something would have been devised to keep the streets clear. In the recent case of *Reg. v. Lewis*, in the Queen's Bench Division, there was a prosecution by the mayor and corporation of Manchester for nuisance. The nuisance consisted in the placing in the windows of a shop 'photographs of statesmen and other eminent persons, — as Mr. Gladstone and the late Lord Beaconsfield and bishops, — sometimes in ludicrous attitudes or positions, with mirrors, colored lamps, and other similar devices,' attracting large crowds, most of them idlers, some of them bad characters, so that the street was obstructed and persons had their pockets picked.

The defendants were fined forty shillings each, and required to give bonds not to repeat the offense. The case is quite similar to that of the king against the obstructive bookseller." Humorous Phases of the Law, 277.

NUISANCE—COMBUSTIBLE ARTICLES.**BRADLEY v. PEOPLE.**

[56 Barb. 72.]

Near the city of Syracuse, New York, close by a road where people were constantly passing, Bradley and his partners erected a building in which they stored a quantity of gunpowder. The building was of wood and not very strong. Not far from it was a sand bank where men (men who smoked black clay pipes) were daily engaged in digging and hauling sand, and on the principle that a little danger gives a zest to sport, children were in the habit of playing in this sand bank. Within a few rods were some dwelling houses. Lastly it should be observed that the building was raised on posts, not boarded up, and that one day a man who had gone under to get out of the rain was *actually seen smoking* there.

This was too much for the neighbors, who expecting to be blown up at any moment, had the firm indicted. And all the judges agreed that they were guilty of a nuisance.

The keeping of large quantities of gunpowder in populous places being calculated to endanger life, is an indictable nuisance. In an old case a man was indicted for nuisance "for keeping several barrels of gunpowder in a house in Brentford Town, sometimes two days, sometimes a week, until he could conveniently send them to London." Lord Holt said that to support the indictment "there must be apparent danger or mischief already done, and that though

gunpowder be a necessary thing, and for defense of the kingdom, yet if it be kept in such a place as is dangerous to the inhabitants or passengers, it will be a nuisance." Anonymous, 12 Mod. 343. In a leading case in New York two men called Sands had stored in a house on a public street in Brooklyn fifty barrels of gunpowder. It was held that if the house was secure, and fit for such a purpose, and if the gunpowder was properly stored, they were not guilty of a nuisance. *People v. Sands*, 1 Johns. 78. It may, therefore, be said to be the rule that keeping gunpowder in quantities, even in a city, is not a nuisance, but becomes so only when it is negligently kept. Negligence was very apparent in the case of the Syracuse powder house above.

NUISANCE—SELLING UNWHOLESOME FOOD.**GOODRICH v. PEOPLE.**

[19 N. Y. 574.]

This case may make the reader a vegetarian for the rest of his life. Farmer Goodrich having a cow which had a swollen face and a very sore eye with an offensive discharge, concluded she would pay better as meat. So he killed her and sent her carcass to market. Being indicted for doing this, the evidence of experts showed that the disease had extended to the whole animal, and its flesh was tainted.

It was held that the offense was complete, although the taint was imperceptible to the senses and the eating of the flesh produced no apparent injury. "As I understand the evidence of the physicians," said Balcom, J., "the eating of diseased meat, although it produces no obvious ill effects, does in reality injure the health of those who partake of it. * * * Dealers in tainted provisions have no right to palm off their noxious articles until they have prostrated those who eat them by actual sickness. The people must be protected against the sale of unwholesome provisions, by the punishment of persons who deal in them, although nobody be made apparently sick by eating them."

The public health, whether affected through the medium of unwholesome food or drink, or poisoning the atmosphere, or introducing infections, is jealously guarded by the common law.

Whoever either exposes for sale, or has in his possession, intending to sell it for human food, articles which are not fit for human food, is guilty of a nuisance. One John Dixon, baker, had the contract for supplying the children at a certain public institution with bread. It was not long after he took the charge of this department before the children commenced to complain of the badness of the loaves, and some of them being cut and tasted lumps of coarse alum were found in them. It being proved that alum was an unwholesome ingredient, the baker was found guilty. *King v. Dixon*, 3 M. & S. 11. So Mr. Hunter, of Tennessee, who sold diseased pork (trichine, I suppose), was convicted. *Hunter v. State*, 1 Head, 160.

Of course, the food must be something more than merely "unwholesome," otherwise it would be easier for a camel to pass through the eye of a needle than for a boarding-house keeper to keep out of gaol. The food, if meat, must be diseased or infected; or if not meat, it must be averred to be unfit for the food of man, to be indictable. And, as the protection of the health is the ground upon which the law bases its action in punishing this offense, it is necessary that the food should either have affected, or be capable of affecting, the health of man. A North Carolinian, whose pet bear had died a natural death in his pen, offered some of its meat for sale to the neighbors as a delicacy. On some of them remarking that it smelled rather strong, he replied that that was the way bear's meat always smelled. Some of them bought a steak or two, took them home and cooked and ate them, but subsequently found out that instead of having been shot, Bruin had died of disease. They had the owner arrested. On the trial the judge told the jury that it was not necessary that the meat was such as to produce sickness or death, but that if the bear was found dead, and in such a state as, according to the usages of decent and Christian people, to be unfit for food, the defendant was guilty. But the Supreme Court thought this wrong. "The gist of the offense," said they, "consists in the knowingly selling for lucre provisions which may be injurious to the *health* of those who are to consume them. To support this indictment the meat sold must have been in such a state that if eaten it would, by its noxious, unwholesome, and deleterious quality have affected the *health* of those who were to have consumed it." *State v. Norton*, 2 Ired. (L.) 40.

And it is essential that the prisoner should have intended the article to be used as food for man. Crawley, who the report states was a higgler (I was in doubt as to what a higgler might be, but I

find it is old English for a hawker or peddler) sent the carcasses of two pigs to a butcher in London. An inspector, with a sharp nose, took a look at them and found them so bad that he had the higgler charged with nuisance. The higgler, however, proved that he had sold the meat for dog meat and as the law is not solicitous about the health of the canine tribe, especially when they are not licensed, Crawley went free. "If the prisoner," said Willes, J., to the jury, "did not mean that the meat should be sold as and for human food, nor sent it for that purpose, you may acquit him," which they did. *Queen v. Crawley*, 8 F. & F. 109. So the meat might be intended for wild beasts in a menagerie—the hyena for instance, who likes his food the better the more putrid it is, or it might be sold for manure. *People v. Parker*, 88 N. Y. 85.

But it seems that the intention of the seller always governs, and if the prisoner intended to sell the food for consumption by man the intent of the buyer to use it in another way would not help him. —*Id.*

*NUISANCE—CONTAGIOUS DISEASES.***KING v. VANTANDILLO.**

[4 M. & S. 78.]

Mrs. Vantandillo, carrying her child in her arms, walked down the street one afternoon. Every passer-by who glanced at the child was suddenly seized with a liking for the middle of the street, notwithstanding the mud and the danger of being run over by vehicles. For the child had the small-pox, and such a bad case that one look was sufficient to satisfy the most shortsighted pedestrian. Later Mrs. Vantandillo was arrested for nuisance and convicted. "There can be no doubt in point of law," said LeBlanc, J., in passing judgment, "that if a person, unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all subjects and indictable as such."

Mr. Browne humorously observes that Mrs. Vantandillo's offense was putting a nuisance on foot. In a more strictly, legal, sense, it was endangering the public health. Before vaccination had become general, but yet while inoculation was in practice, a London surgeon had inoculated a number of children and while they were suffering from the disease, which, though mild in form was nevertheless infectious, he permitted them to be carried through the streets and to come in contact with other people. The surgeon was convicted of a nuisance, Dampier, J., saying: "The charge amounts to this: that the defendant after inoculating the children, unlawfully

exposed them while infected with the disease in the public street, to the danger of the public health." *Rex v. Burnett*, 4 M. & S. 272. And an infected or diseased person exposing himself would be guilty of the same offense. Glanders is a "horse" disease as we know from the lines of the dramatist: —

"Oh, you are? Then pray, sir, what is my complaint?"

"Complaint? What shall I say? I wish he would return — O 'tis the — the glanders."

"The glanders! Zounds! do you make a horse of me?"

But Mr. Dearsley, the English reporter, informs us that it may be communicated to man and cites a case where a whole family, consisting of a man, his wife and four children, died of glanders communicated to them by a horse which the man had purchased of a horse dealer. Under these circumstances, Mr. Henson's conviction was certainly just, although he was not the horse dealer just spoken of. However, Mr. Henson one July day brought a horse he had for sale to the market at Melton Mowbray. The horse had the "glanders," and Mr. Henson knew it, and being subsequently indicted for nuisance was found guilty. *Reg v. Henson*, Dears. 24.

A case which falls under this principle is *State v. Buchanan*, 8 N. H. 203. The defendant, having a spite against David Wilson, dropped some dead cats into his well, knowing very well that from this well Wilson's family got all the water which they drank and cooked with. After a few days the water commenced to be very foul, and in the end the Wilsons were made sick. The defendant was very properly convicted, the court making these remarks: "There can be no question but that the mixture of poisonous ingredients with the food or drink of another to such an extent as to impair the health of any individual receiving them, is punishable by indictment at common law, and water infected with the noxious particles and effluvia of a dead animal thrown into it, must partake of a character so poisonous and unwholesome as properly to come within this class of offenses." In Indiana, the same conclusion was reached in a case where the defendant had used a spring of water as a urinal. *State v. Taylor*, 29 Ind. 517.

So, where a mill-owner in Iowa, by damming up the water, caused it to overflow and become stagnant and marshy, whereby the air was corrupted, he was held guilty of a common nuisance. *State v. Close*, 85 Ia. 570.

And in like manner to endanger the public safety in ways other than by disease is a nuisance and indictable, as in an old case where

a man allowed his house standing by the highway to become so ruinous as to be likely to fall down and injure passers-by, it was held that he had committed a common nuisance. *R. v. Wilson*, 2 Strange, 1167.

***NUISANCE — OFFENSES OF PERSONAL DE-
PORTMENT.*****GRISHAM v. STATE.**

[2 Yerg. 589.]

John Grisham, yeoman, and Jane Legan, spinster, were indicted for "open and notorious lewdness." The proof was that they had been living together for some time without having called upon the preacher, or the Issuer of Marriage Licenses. As neither of them had ever been married, they could not, as we have seen,¹ be indicted for adultery, and so they attempted to get off on the ground that if they had been "lewd" there had been nothing "open and notorious" about their actions.

But the defense did not avail them. "Acts or conduct," said the court, "notoriously against public decency and good manners constitute an offense at common law. * * * Now what is the gist of the prosecution. It is this, that the act or acts or particular conduct charged be notorious and against good manners, not that they should have been committed in the public streets or elsewhere exposed to the view of divers spectators. Such an exhibition as this is not necessary to satisfy the term notorious, and portray its character and import. The requisition of the term

¹ *Ante*, p. 121.

‘notorious’ or ‘notoriously,’ in the constitution of an offense of the nature spoken of, is sufficiently answered if the act is done in such a manner or under such circumstances as necessarily to become public or generally known in the neighborhood. As in the case before Lord Hardwicke, where it appeared in a cause in chancery that a man had formerly assigned his wife over to another man, Lord Hardwicke directed a prosecution for that transaction as being notoriously against public decency and morals.”

The law punishes offenses against good manners when they are of a notorious character. The following are instances of this kind of nuisance: —

Common scolding, which is an offense of this character. To hold a woman liable to punishment for a too free use of her tongue, the common law thought a very reasonable thing. Therefore, where a woman was habitually addicted to scolding in public, she was indictable as a “common scold.” Formerly the punishment was a ducking — the woman being placed on a stool at the end of a beam which was over a pond and which, by means of a lever, raised her in the air and then dropped her into the water again and again until she was half drowned. This penalty is now obsolete, being succeeded by fine and imprisonment. *James v. Com.*, 12 S. & R. 286. As late as 1866, when the Supreme Court was appealed to on the ground of politeness to refuse to recognize the offense, it turned a deaf ear, the Chief Justice saying: “The argument drawn from the indelicacy and unreasonableness of such a prosecution of a female should be addressed to the Legislature rather than to the courts, for courts of justice who declare, rather than make the law, are insensible to all considerations of gallantry.” *Com. v. Mohn*, 52 Pa. St. 246. It is a feminine offense entirely, though a somewhat kindred nuisance, viz.: *Common brawling* is generally committed by the male gender.

Eaves-dropping is another nuisance of this kind. It consists in listening at a man’s window or wall or other part of the house, in order to hear what is going on inside, and make it the gossip of the neighborhood. A man’s house is his castle, and no one has a right to pry into one’s secrets, whatever they are. Therefore, it is

at common law an indictable offense to clandestinely hearken to the discourse of a man or his family in his own house. And it has been held that a person who secretly ensconces himself near the room of the grand jury, in order to hear what they are saying and doing, is an eaves-dropper. *State v. Pennington*, 3 Head, 299. I cite this case as a warning to the enterprising reporters of our daily newspapers; but I very much doubt if they will heed it.

A husband, however, may listen to his wife without being guilty. Mr. Lovett was tried in Pennsylvania, in 1831, for hiding under the chamber window of a married woman, hearing what took place there, and then telling on her out of school. He was able to show, however, that he had been engaged to do this by her husband, who for some reason or another "smelt a rat." This was held a good defense. "Some evidence," said the court, "has been offered to show that the owner of the house, the husband, gave this man authority to watch his wife. If he did so, as he had a right to do, the defendant should be acquitted. There is no law that can prevent a husband from constituting a watch on his wife." *Com. v. Lovett*, 4 Clark, 5.

But to constitute eaves-dropping there must be a "listening or hearkening of the discourse." Looking through the keyhole, or peeping between the shutters or through a knot-hole, is not indictable, a man being allowed to look wherever he pleases. *Com. v. Mengelt*, 4 Clark, 6. For which reason Tom of Coventry, who

"low churl, compact of thankless earth,
The fatal byword of all years to come,
Boring a little augur hole in fear,
Peeped—but his eyes, before they had their will,
Were shrivelled into darkness in his head
And dropt before him."—

if he had not been blinded, could not have been convicted of eaves-dropping.

Private drunkenness is not an offense at common law, nor is it as a rule even by statute. It becomes an offense, however, by being so open and exposed to public view, and so frequent as to be a nuisance to the neighbors. The guzzler then becomes a *common drunkard* and is indictable, *State v. Waller*, 3 Murph. 229.

And so at common law mere private lewdness or immorality is not indictable. *State v. Cagle*, 2 Humph. 414. Therefore an indictment against a man charging him with visiting a house of ill-fame must

allege that "knowing it to be such," he did "openly and notoriously" frequent it. *Brooks v. State*, 2 Yerg. 482.

Indecent exposure of the person is an indictable nuisance. It must take place in a public place and before more than a single person to be an offense at common law.

*NUISANCE — OFFENSES TO PUBLIC DECENCY.***REG. v. GREY.**

[4 F. & F. 73.]

A gentleman who, half a century ago was a boy, has related to me how, on one occasion, he was deputed to dispose of the unnecessary increase of the family cat. Drowning not suggesting itself as the easiest mode, he carried the kittens to the nearest woods. But being without a weapon he was obliged to resort to the expedient of taking each tabby by the tail and battering its head against the nearest oak tree. The result, particularly in the matter of blood and brains, was not reassuring. When the boy reached home, he was observed to have the appearance of a youth who has just attempted his first cigar, and was consequently asked as to what was the matter with him. His reply simply was that it made him sick to kill cats.

A similar feeling took possession of those citizens of Chatham who passed by Mr. Grey's drug store one morning. For the enterprising vendor of pills had put up in his window a large colored picture, life size, of a man naked to the waist, and covered with filthy and disgusting eruptions and sores. This was the man before taking Grey's Cure. Next to him was a picture of a person *sans* pimples, *sans* sores, and this was the same man after taking Grey's Cure.

Mr. Grey was indicted for creating a nuisance and pleaded not guilty. But on the day of trial, when he unrolled the picture, his counsel was so disgusted with it that he advised him to plead guilty. He did so and the judge passed sentence on him saying: "That is the proper course to adopt. There is no doubt the exhibition of the picture on a highway is a nuisance. It is so disgusting that it is calculated to turn the stomach. No man has a right thus to expose disgusting and offensive exhibitions in or upon a public highway. The object, no doubt, is to display the nature of a particular disease and the effect of a particular medicine; but it is not commendable, even to medical men, to display such representations in public. The exhibitions must not be repeated."

Any public exhibition of gross and wanton indecency is a nuisance. Under this head fall the following:—

Keeping a house of ill-fame or bawdy house, which is a nuisance of this kind. "Although," says Coke "adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdy or stews or brothel house, being, as it were, a common nuisance is punishable by the common law." The keeper may be a man or woman, but more women than one must resort to it, and more than one act of illicit intercourse must be shown in order to constitute it a bawdy house. And it is not necessary that the establishment be carried on for lucre or that there be any indecency or disorder visible from the outside.

Keeping a common gambling house is likewise indictable at common law. Simple gaming is not; though in some States it is by statute.

Exhibiting obscene or indecent pictures or printing and selling works of this character is a nuisance. It is difficult in such cases to determine whether or not a particular book or picture is obscene or indecent within the law. Many, no doubt, think that the nude in art should be considered as obscene and indecent. But the law does not hold to this opinion—a publication may be technically obscene, yet it is only when it tends to corrupt the morals by

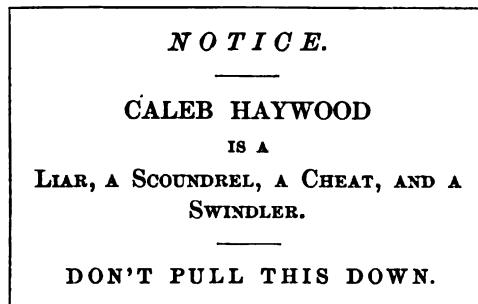
inflaming the passions and exciting to immoral conduct that it is punishable. A person named Comstock living somewhere in New York, has made this branch of the law notorious during the past few years by endeavoring to prohibit everything from the works of the old masters, in the art gallery, to the china doll, in the toy store window, unless completely clothed. He is certainly not a candidate for the Order of the Garter, whose motto he evidently cannot comprehend.

Every person has a right to Christian burial, and a pauper dying in another's house must be buried by the dweller in that house; it is his duty to do this and to neglect to do it would render him liable to be indicted for nuisance. *Queen v. Stewart*, 12 Ad. & El. 773. And the right is to be *buried*. A man in Maine, instead of burying an infant, threw its dead body into the nearest stream. He was held punishable for a nuisance. *Kanavan's Case*, 1 Me. 226. And so to disinter a dead body is also an indictable offense. *R. v. Gillies*, R. & R. 866. In an English case a gaoler refused to deliver up for burial the dead body of a prisoner who had died in gaol to the executors, on the ground that deceased owed him some money. It was held that the gaoler was guilty of an indictable nuisance. *Reg. v. Scott*, 2 Q. B. 248.

CRIMINAL LIBEL — TRUTH, WHEN A DEFENSE.**COMMONWEALTH v. CLAP.**

[4 Mass. 163; 3 Am. Dec. 212.]

Mr. Clap's opinion of Mr. Haywood may be judged from the following sentiment, which he caused to be printed and posted up in prominent places in the town where both of them resided: —



For indulging in this little pleasantry Mr. Clap was indicted for libel. When the trial came on he wanted to show that Mr. Haywood was all that he had said of him, but the court refused to let him, saying that the truth of the statement made it none the less a criminal libel.

On appeal to the Supreme Court this ruling was affirmed, Chief Justice Parsons stating the law as follows: "A libel is a malicious publication expressed

either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. The cause why libelous publications are offenses against the State, is their direct tendency to a breach of the public peace by provoking the parties injured and their friends and families to acts of revenge, which it would not be easy to restrain, were offenses of this kind not severely punished. And every day's experience will justify the law in attributing to libels that tendency which renders the publication of them an offense against the State. The essence of the offense consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel as an offense against law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions and to excite revenge is not diminished, but may sometimes be strengthened. The inference is, therefore, very clear that the defendant can not justify himself for publishing a libel merely by proving the truth of the publication, and that the direction of the judge was right. If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libeled. He is not a party to the prosecution, nor is he put on his defense; and the evidence at the trial might more cruelly defame his character than the original libel. Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the

charge, by proving that the publication was for a justifiable purpose and not malicious, nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame. Upon this principle a man may apply by complaint to the Legislature to remove an unworthy officer; and if the complaint be true and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against their laws. And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct. For the same reason the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it

may be to the loss of their liberties. But the publication of a libel maliciously and with intent to defame, whether it be true or not, is clearly an offense against law, on sound principles, which must be adhered to so long as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the Commonwealth."

Libel is the malicious publication of any writing, sign, picture, effigy or other representation tending to defame the memory of one who is dead, or the reputation of one who is living, and to expose him to ridicule, hatred, or contempt. A letter or passage in a book or newspaper, words written on a wall, a picture, or an effigy, such as a gallows set up before a man's door, may be a libel.

Slander, however, (i.e. oral defamation), is not an indictable offense in this country. In England there was a common-law offense known as *scandalum magnatum*, which was defined as being to "speak or to tell any false news, lies, or other such false things of the prelates, dukes, earls, and other nobles and great men of the realm." But as we have no "prelates, dukes, earls, nobles or great men of the realm" in this sense — for in the United States, before the law, no man can be more than an "American citizen," so we do not recognize any *scandalum magnatum*.

The test as to whether a publication is an indictable libel or not is, does it expose him to ridicule, hatred or contempt, so as to stir him up to break the peace, or hunt the libeller up and give him a thrashing.

There was nothing of the public spirited citizen about Mr. Teller, of Detroit, Michigan, nevertheless he felt mad when he read the following item in the newspaper, referring to himself: "The above druggist, in the City of Detroit, refusing to contribute his mite with his fellow-merchants for watering Jefferson Avenue, I have concluded to water said avenue in front of Pierre Teller's store for the month ending June 27, 1846." Finding out the man who wrote this he had him arrested for libel. But the charge would not stick. "He refused," said the court, "to contribute his mite; and if this was not commendable, it, at the least, is obvious it was his right to do so; and I cannot see how the charge has any tendency to expose him to public hatred, contempt, and ridicule." *People v. Jerome*, 1 Mich. 142. The judge probably understood the temper of the people of Detroit; but in some com-

munities I know of, the man who would refuse his mite in such a case would be justly regarded as an obstructionist of the worst kind, and would be certainly ridiculed and perhaps hated by the citizens generally.

A person who is injured by a libel may sue the libeler for damages, or he may prosecute him criminally. In the civil suit, his claim is grounded on the injury which the publication has done to his property or to his reputation, and if he prove his case, damages will be awarded him to this extent. The criminal prosecution for libel is, however, based upon an entirely different foundation. The gist of the crime is not the injury to the party libeled, but is the breach of the peace which the charge will be likely to produce. Therefore, while in civil actions of this kind, the defendant might defeat the suit if he could show that the publication complained of was true — for the law would not permit the plaintiff to recover damages for an injury done to a reputation to which he had no right — yet on a criminal prosecution the truth was no defense. Indeed, this was carried so far that a few years ago the maxim used to be "the greater the truth, the greater the libel," meaning that the injudicious, or spiteful publication of the truth about one would be more likely to sting him to a breach of the peace than if some falsehood were invented about him which he could easily and completely refute. As the Parson said in his sermon in the Laureate's Poem:—

"A lie which is half a truth is ever the blackest of lies.
"For a lie which is all a lie may be met and fought with outright,
"But a lie which is part a truth is a harder matter to fight."

The truth is a defense, however, when it can be shown that —

1. *The publication was for the public benefit.* Thus the characters of public men are in some sense public property, and, therefore, to publish of them that they had been guilty of crimes or offenses, or the like, would not be punished criminally if true.

2. *That the publication was privileged.* Not only those who take part in public affairs, but every person who publishes a book or other literary work, or who takes part in a public entertainment, submits himself to criticism. Therefore criticism of a man's book or his picture is privileged. In like manner, where one is under a legal, or moral, or social duty to give another information of a person's character, what he may write to such one is privileged. A., for example, being asked the character of B., who had been his servant, by C. who is about to engage B. as his servant, writes of

B. in a letter to C. the words: "B. is a drunkard and a thief." If this is true, or if A. honestly believes it to be true, this is not a libel. But if he goes beyond the necessity of the occasion it is different. Thus, if A. had published this letter in a newspaper it would be a libel.

So anything said in parliamentary and judicial proceedings, and their publication afterwards, are privileged.

In most of the American States, the common law has been so amended as to permit the truth of a libel to be a justification in criminal as well as in civil cases.

*CONTEMPT OF COURT.***PEOPLE v. WILSON.**

[64 Ill. 195; 1 Am. Cr. Rep. 107.]

A Chicago murderer who had been twice convicted and sentenced to death had twice obtained the aid of the Supreme Court of Illinois in deferring his punishment by granting him a new trial. The citizens began to get tired of this and to talk of lynch law. The newspapers are generally a correct mirror of public opinion, and so one evening the *Chicago Journal* contained this editorial: —

“THE CASE OF RAFFERTY.

“At the time a writ of *supersedeas* was granted in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the Supreme Court and decided at once — that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty’s counsel seems to be studying the policy of delay, and evidently with success. The riff-raff who contributed fourteen hundred dollars to demonstrate that hanging is played out, may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime. If next winter’s session of the

Legislature does not hermetically seal up every chink and loophole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our mode of procedure in murder trials. The criminal should be tried at once, and when found guilty should be hanged at once — and the quicker hanged the better. The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession, who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy and it must be found."

The judges of the Supreme Court of Illinois took this as reflecting on themselves, and the editor and proprietor of the *Journal* were brought before the tribunal and fined. The court held that under the statute which provided that the court should have power to punish contempts offered by any person to it while sitting, it had power to punish as constructive contempt a newspaper article referring to a case then pending in court. All acts calculated to impede, embarrass, or obstruct the court in the administration of justice, are considered as done in the presence of the court.

A contempt of court is a disobedience to the rules, orders, or dignity of a court. The punishment of contempt is very summary. If the contempt is committed in the presence of the court the officer may be at once fined or sent to jail without any further trial or proof. If it is done outside the court, the party is summoned by attachment, and the punishment is summary as in the first case. The power is confined to courts of record; but it is also exercised by legislative bodies.

Contempt of court may be committed by: —

1. *Inferior judges and magistrates* — as by disobeying orders issued from a superior court; or by proceeding in a cause after it has been put a stop to or removed from their jurisdiction by a writ of prohibition, *certiorari* or *supersedeas*.

2. *Officers of the court* — as by abusing the process of the law or deceiving the parties by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty.

3. *Jurymen* — as by not answering when summoned, or refusing to be sworn or give any verdict. In the exercise of their judicial capacity, however, as in giving a verdict, even though it be ever so erroneous, they are privileged.

4. *Witnesses* — as by refusing to come to court when summoned or refusing to be sworn when there.

5. *The parties* — as by disobeying any rule or order of court or non-payment of costs in certain cases, or interfering with the jury or witnesses.

6. And generally by all *persons* acting in disrespect of the court's authority, as by wrong or indecent conduct in court, interfering with the proceedings or interrupting them.

Another class of contempts are those committed by the offender not present in court — for example, by disobeying the writs of the court; by speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts of causes depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority is entirely lost among the people. Harris Cr. L. 90.

But in *People v. Wilson*, it is said that to criticise decisions already made would not be contempt, so long as the decisions were correctly stated, and the official integrity of the judges not impeached. It would be rather severe on a legal writer if the rule were the other way.

The case of the Chicago editors given above furnishes a convenient text for a brief homily in this place upon the apparent incapacity of the courts of this country, at the present time, to punish crime with certainty and speed. There is not the slightest doubt that there is a good deal of "contempt" abroad among the people for the courts who seem to impede justice instead of doing justice. This "contempt," welling up into a mighty flood, swept over Cincinnati a few weeks ago, and threatened for a time to make an end of courts and lawyers and criminals at one fell swoop. It manifests itself in the formation of vigilance committees in different parts of the country, and that there is some need for them would appear to be proved by

the fact that during last year Judge Lynch executed, throughout the United States, more criminals than did the official hangman. The feeling is abroad, I say, that the criminal law, as now administered, is a failure. And there is more truth than poetry in it. I expect judges, as well as practicing lawyers, to see this book, and at the risk of being cited for contempt before some tribunal who may feel my sermon particularly applicable to itself, I propose to address a few plain words to the judges of the appellate courts of this land.

MY ASSIZE SERMON TO THE JUDGES OF APPEAL.

HONORABLE SIRS: In earlier days your predecessors across the water, in that land whence our common law came, used on the Sunday before the opening of the assize to attend in great state the city cathedral and listen to a sermon upon the needs of law and the beauty of justice. I ask you to spare a moment to listen to my assize sermon, and to pardon me if I point out to you the errors of your ways. You must know, you surely cannot be ignorant of the fact, that the people are beginning to lose that old respect which has been theirs so long for things judicial. They see that the jails are getting more crowded each year. They see that murder is becoming a common pastime, and they are asking why it is that crime is increasing, and that criminals are going unpunished. They are laying the blame at your door. They are saying, "What are our criminal courts for if not to punish crime, and if they can not punish crime what is the use of them?" They are becoming so convinced of this that whenever a crime which particularly shocks their sensibilities is committed they do not wait for your slow and uncertain methods, but they constitute themselves a court whose code knows no technicalities, whose decrees are not appealable, and whose orders are promptly carried out under the nearest tree. And, pardon me, Honorable Sirs, for saying that the people have much good reason for their opinion.

I said that the people's tribunal (I mean the one over which Judge Lynch presides; and he is fast becoming a very formidable rival of yours, for last year more murderers received their due at his hands than at yours), allowed no appeal from its decrees. They rightly reason that if a man is guilty, the quicker he is punished the better, and that one court is as well able to determine whether he is guilty or innocent as a dozen courts would be. They are cor-

rect in this view of the matter. It is this multiplication of courts that renders justice so slow. Here in this State—and in nearly all the other States it is about the same—there are three grades of courts, the trial court, the Court of Appeals and the Supreme Court. Through these three tribunals every capital case is made to pass. In only one of them—as you well know, Honorable Sirs, for you see it every day—is the guilt or innocence of the prisoner ordinarily the subject of examination; the time and learning of the two last being taken up in examining the machinery of the first. This right of appeal is unlimited. It matters not that on the trial the proof against the prisoner was clear and incontrovertible; that to the minds of judge, jury, and spectators, the correct verdict had been arrived at beyond the shadow of a doubt—he is allowed to appeal even though there is nothing to appeal about, and to invent reasons which everybody knows do not exist. In every other place where the common law is in force, except the States of this Union where this unlimited right of appeal is allowed, the judge would say to the prisoner in such a case asking for an appeal: "You have had a fair and impartial trial, every step in which has been taken in accordance with legal rules. No question of doubt or difficulty has arisen, and I must, therefore, refuse to entertain so groundless an application." But under the happy system which prevails in this and other States, the prisoner takes the case out of the judge's hands without asking his permission or requiring it. The curious result follows that the moment the prisoner is found guilty of the crime charged, he, and the judge before whom he was tried, exchange places. Hitherto the case has been: The State *v.* John Smith, murder. But the case which goes to you, Honorable Gentlemen of the Appellate Courts, should really be entitled: John Smith *v.* The Trial Judge,—mistakes in conducting proceedings in court. John Smith convicted of a foul and brutal murder by a jury of his countrymen, goes to you, Honorable Sirs, with alacrity and hope. If the trial judge, who is defendant now, cannot show you, Honorable Sirs, that he made no mistake in the long trial which resulted in John Smith's conviction, the latter knows that the chances are nine to one that he will never be punished. And the chances are many that the trial judge did make a few errors, even though they did not affect the verdict, which latter circumstance, you know well, O Honorable Gentlemen of the Appellate Courts, is always an immaterial matter to you.

The chances are many that he did make a few errors, when we consider the difficult position which a trial judge occupies. Sitting day after day in the midst of a contest, every turn of which he

must watch, he has, after reaching this position, but little leisure for any systematic study of the law, and this, therefore, almost altogether he must have accomplished before his elevation to the bench. Below him he sees men a great part of whose daily labor consists in investigating the thousands of technicalities which generations of judges before him have evolved. At every stage of the cause, scores of times in a single case or day, he is called upon to decide questions of practice, of evidence, of construction of documents or statutes, of difficult legal principles, many of which are presented to him for the first time in his experience as a judge or as a student. His rulings must be as rapid as the points made are numerous, for the trial must not come to a standstill. In a capital case, where each point is contested by active and acute counsel, he will, probably, when the trial is concluded, have made as many as fifty different rulings on questions connected only remotely with the main issue, between the impaneling of the jury and the passing of the sentence. The next day he is in the middle of another case involving points equally technical and irrelevant, equally difficult and numerous, all to be decided in the same manner. Meanwhile the prisoner has been taken back to his cell, and there is for a time an apparent calm. His counsel are preparing an appeal. They are ransacking the thousands of adjudicated cases which the law reports of England and America contain, in an endeavor to find some prior case in which another judge has decided one of the fifty points in a different way; and they will have poor luck if, away back in the time of Jeffreys, or the other day in England, or in the backwoods of Maine, or the swamps of Louisiana, they do not speedily find what they seek.

Perhaps you will tell me, O Honorable Gentlemen of the Appellate Courts, that you did not make the law which has created so many grades of courts, nor the law which allows this unlimited right of appeal. You are right; the people did that, and their responsibility is greater in this respect than yours. Yet, tell me, O Honorable Sirs, do you not very often, even when it is a red-handed murderer that asks it, grant a criminal a writ which you call a *supersedeas*, which puts off his punishment until he can make his appeal, and without which he would be punished at once? Are you obliged to do this, or is it not a question for your discretion? And do you not, as a rule, exercise that discretion for the benefit of the criminal and the postponement of justice?

But I am coming to a matter which you can not evade, the responsibility of which you are not able to shift, but which is

yours, and yours alone. If it is not your fault that justice is slow, it is all your fault that justice is uncertain.

There are right and wrong methods, Honorable Sirs, of doing everything, and it is, of course, desirable that the former should be adhered to as strictly as possible in the law, in order that loose practice shall not be encouraged. But do you think that it accords either with the popular or the natural idea of Justice that right should be defeated, and wrong prevail through mistake or ignorance? To an observer, Gentlemen of the Appellate Courts, procedure, not evidence of guilt, not justice, seems to be the pivotal point upon which, with you, the conviction or acquittal of a criminal depends. To an on-looker, Gentlemen of the Appellate Courts, the right or wrong of the case seems to be passed over by you: the manner of engineering a case through the greatest number of courts appears to be the object that engrosses the legal genius of the country as exemplified at your different bars. An ounce of procedure in defense seems to have a more certain effect than a pound of evidence of guilt.

There are two classes of wrongs, Honorable Sirs — one is fundamental, the other is merely arbitrary. To the first class belong all crimes against society, the knowledge of which is innate in every citizen; the second comprise only those wrongs which for the sake of expediency are made so by the government. Murder, theft, perjury, and all the other crimes which are *malum in se*, illustrate the first class; accidental flaws and errors in legal procedure, the second. In this country to-day society is demoralized, the old respect for the law of which I have spoken is rapidly disappearing, crime is triumphant, for the reason that it has become a rule of action with you, Honorable Gentlemen of the Appellate Courts, that the penalties consequent upon the committal of a wrong of the first class may be escaped by the criminal because of the unintentional committal by the prosecution of a wrong of the second class. Pardon me again, Honorable Sirs, but you remind me of Hudibras. Like him you are profoundly skilled in analytic; like him you can

Distinguish and divide
A hair 'twixt south and southwest side;

you perceive readily the difference between tweedledum and tweedledee, but you do not appear to have awakened to the fact that the people are commencing to clamor for the enforcement of the laws and the punishment of criminals. At the present moment,

(Pardon me once more, Honorable Sirs, I speak more in respect for than in derogation of your high office, more in sorrow than in anger) most of you, O Honorable Gentlemen of the Appellate Courts, if your acts mean anything at all, believe it better to arrive at an unjust decision by means theoretically correct, than to arrive at a righteous decision by imperfect means.

Do you deny this, Honorable Sirs? I do not think you can. Your decisions are in print. I have been a close student of them for many years. Had I not read them with the care I have I should not have taken this subject for my Assize Sermon, and I would not have known just how the failure of the criminal law in this land has come about. In every volume of your reports I find some proof of what I have charged. But a more striking proof it has been my lot to receive. Yesterday, as I hurried through the crowded street, I passed a group of men. I turned my head; it struck me that I had seen them before. Another look was sufficient. I had seen them but a few months ago in the city jail, every one of them under conviction for a foul and brutal murder. Why are they at large, thought I. Then I determined to ask them, and ran after them. "How come you here, Mr. Ruffian," said I. "The Supreme Court let me off, because the clerk spelled 'breast,' in my indictment, *brest*." "And you Murderer?" "My indictment said that the fellow I shot did *instantly die*, but the Supreme Court said it should have been did *then and there die*." "And you Cut-throat?" "One of the subpoenas had no seal on it." "And you Assassin?" "The prosecuting attorney on my trial asked one of my witnesses if she had ever been in the penitentiary." "And you Manslayer?" "The judge who tried me, read the law to the jury instead of writing it down." "And you, Garroter?" "The jury didn't spell the verdict right—they left out a letter." "And you Malefactor?" "The Supreme Court said I had a right to be in court when I was sentenced." "And were you not?" "Oh, yes; but the clerk forgot to mention it in the record and the court could not condescend to ask him." Had the men lied to me? Oh, no. Last night I found their cases in the reports. They had spoken truly. And your names, O Honorable Gentlemen, were all there—sometimes you "delivered the opinion," sometimes you "concurred," occasionally you "dissented," but the criminal was always triumphant, and justice was always overthrown.

The result of such decisions as these, O Gentlemen of the Ap-

pellate Courts, has been to spread among the criminal classes a deep-rooted feeling that you, Honorable Sirs, are their friends and exist for their protection. They have learned that to be convicted by a jury and to be sentenced to be hanged are matters of small importance. They have seen scores of their pals sentenced with all the forms of the law to be hanged on a certain day, but the oldest among them cannot remember an instance of the sentence being carried out on that day. They are not learned in law phraseology, they know little about *supersedeas* or *habeas corpus*, writs of error and the like; but this they do know, and it is enough for them, that there is a higher and greater power than that which confronts them with their crimes and adjudges their punishment. They have seen that this power can always be depended on to stay the day of doom. It steps between them and the gallows even when they have reached its foot. Thus the murderer comes to have great faith in you, O Honorable Gentlemen of the Appellate Courts. The trial court he detests. There are the witnesses who saw him commit the foul deed; there are the relatives of his victim: the widow, whose protector can never return to her; the children calling in vain for their father. There is the Judge, before whose stern and searching eye he quails; the jury whose verdict he anticipates without hope. As he confronts the crowded court-room, he feels that there is not a soul there who does not think him guilty, and wish to see him punished. But he knows, O Honorable Sirs, that you will not see him; he is glad of that, and he rejoices, too, as he remembers that you will not even try whether he is guilty, as the jury are doing, for if you should he would despair. No; he understands that what you will do will be to ascertain whether the lawyers have not asked too many questions or said too many things in their speeches, or whether the Judge has not given a wrong definition to a word, or whether the Clerk has not made a mistake in moistening the official seal of the court with a sponge, instead of following the old and well established practice of licking it with his tongue. He hears the verdict of "guilty," and the sentence of the judge that he is to be hanged by the neck until he is dead, with indifference; he goes back to his cell feeling quite comfortable, and does not lose an hour's rest that night. His faith is justified, as in the course of four or five months a message comes from you: "Reversed and remanded for a new trial."

Wake up, O Honorable Sirs. Engaged in solving judicial puzzles put before you by acute and tricky lawyers, you are

forgetting society and the public weal. Choked with your own food, you are sitting speechless and insane. But arise, for in the background, I see Judge Lynch preparing to turn you all out of doors.

I know, O Honorable Sirs, that you are honest men; to the credit of our American judiciary, be it said that the hands of our judges are clean; we have had few Macclesfields, we have had no Bacons. I know too that on principle you desire to punish crime. But your training at the bar has made you ready to look at procedure and to miss the right of the case. As I cast my eyes over my congregation, I see a few of you — your hair is very white and your number is small — who I remember very well fought hard, very hard, against the reform of the procedure in civil cases. You declared that the old system was a scientific one, and if it did cost the suitor more money and more time, it was a beautiful contest — that old special pleading — which only a great man could successfully conduct. But common sense prevailed, and the men that are sorry it did are now I think nearly all in the church-yard. I want to ask you a question. If the people should abolish the technicalities which I have declared delay and obstruct criminal justice, would you help them to carry out the reform? I really believe most of you would. But for you, Honorable Gentlemen of the Appellate Court of Texas, I have but little hope. I can not forget that but a little while since, the people of your State adopted what they called the Common Sense Indictment Act, whose object was to make it lawful in criminal trials to call a spade a spade; that it should be enough to say in an indictment that A. murdered B., or C. robbed D.; and I have not forgotten that you said that this was unconstitutional and that indictments must still be long enough and intricate enough to suit the criminals and the criminal lawyers.

What do I hear some one say? That the juries often acquit guilty men, and the odium of this should not be laid at your doors. I have no wish, O Honorable Sirs, to be unfair, nor to charge you with more than is your due. But go to the prosecuting attorneys throughout the land and ask them whether the jury system is the cause of the failure of the law to punish crime. They would, I think, say no. They are not afraid to trust the jury. It is the hair-splitting points in the Supreme Courts that they fear. Why, Gentlemen of the Appellate Courts, the most notorious murderer this city ever had was convicted by a jury three times, and given a new trial on a technicality twice, and released on a technicality the

third time. The last criminal hanged in this city was thrice found guilty by twelve men. No, Honorable Sirs, the jury system is not a failure; but on the contrary the only hope of thwarting the efforts of you, O Honorable Sirs, to free criminals, is in the pertinacity of juries in continuing to convict them. But often, O very often, you wear them out.

I am not delivering this sermon for the first time. I have preached it to the people more than once. They have heeded it little; it takes riot and bloodshed to stir them, as we found in Cincinnati the other day. I see on the outskirts of my congregation to-day men who are neither lawyers nor judges, but who are only members of that great society, the people of the United States. To them I would say a few words. The remedy is very simple, much simpler than burning court-houses, or even organizing vigilance committees. The remedy is but to return to the old common law — the law of England to-day, which gives each man but one trial and makes the issue the question of guilt or innocence, not machinery and procedure. Let no conviction by a jury be allowed to be set aside by another court, unless it was wrong on its merits or unless the prisoner was prevented from making his defense. After a case has been heard once, let that be the end of it — if there are grounds for mercy, present them to the Governor.

Finally, O Honorable Gentlemen of the Appellate Courts, I need hardly say that the cause of the failure of law is not in the law itself. It is written on the statute book, as you well know, that the murderer shall be hanged. Across the ocean, in that land whence our criminal law was brought, justice is sure and punishment is swift. Yet almost the same acts are crimes there that are crimes here, and the same penalties are provided in both countries. The difference is only in the administration of that common law; and because there it is justice and here machinery which is the primary object of the appellate courts comes the reason that that law which in Great Britain is an object of reverence and regard, the protection of the weak, the foil against the strong, the hope of the innocent and the terror of the guilty, is in the United States the shield of the criminal and the despair of the defenseless — a hissing, a by-word, and a reproach. And for this reason — because the failure of the criminal law has been brought about by these methods — the most cultured and widely circulated magazine in this country is forced to say that "the failure of criminal justice which

**makes room for mobs and lynching is a greater disgrace than even
the savagery of the mobs."**

**Honorable Gentlemen of the Appellate Courts, my sermon is
ended.**

**THE END
OF
MY
ASSIZE SERMON.**

CHAPTER IV.

CRIMES AGAINST THE PERSONS OF INDIVIDUALS.

ABDUCTION—“PURPOSE OF PROSTITUTION.”

COMMONWEALTH v. COOK.

[12 Metc. 98.]

A statute of Massachusetts provided that any person “ who shall entice or take away any unmarried woman of a chaste life and conversation from her father’s house or wherever else she may be found, for the purpose of prostitution,” should be punished. Emily Forrest, who was seventeen years of age and unmarried, lived with her father in a Massachusetts town. She became acquainted with John Cook, who one day induced her to elope with him promising to marry her. Cook, after taking her to Philadelphia and living with her at a hotel there for a week, deserted her and she was obliged to go back to her parents. Cook was arrested and convicted under this statute.

But on appeal the Supreme Court said that this was wrong and he was released. “ The court are of opinion,” quoth the judge, “ that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father’s house for the

sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him ; that she must be enticed away with the view and for the purpose of placing her in a house of ill-fame, place of assignation or elsewhere to become a prostitute in the more full and exact sense of that term ; that she must be placed there for common and indiscriminate sexual intercourse with men, or at least that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her ; and that a mere enticing away of a female, for a personal sexual intercourse, will not subject the offender to the penalties of the statute. This decision, while in one respect it narrows the application of the statute, and excludes cases of mere seduction, or illicit intercourse with the individual enticing, leaves a large application of it to cases of a more aggravated character and will embrace all of either sex, who shall fraudulently entice away females for the purpose of supplying brothels and houses of ill-fame, or with a view to induce them to prostitute their persons for money or hire."

Every form of unlawful physical restraint is indictable. The most prominent instances of physical restraint are found in the offenses of *abduction*, *kidnapping* and *false imprisonment*. In the earlier history of the common law abduction consisted in the taking away by force, fraud, or fear, of females for the purpose of marrying them to obtain their property. In modern times the offense has been much extended, and in most of the States by statutes very similar in their import and intention. *Abduction* now consists of the forcible taking or enticing away of children from their parents or guardians, or of females under the age of eighteen (in some statutes twenty-five, in others it is only required that they shall be unmarried) from the charge of their parents or guardians and without their consent for the purpose of marriage or prostitution. This would not have been an offense at common law, unless done with violence and against the woman's will.

The statutes require that the woman shall be of a "chaste life and conversation," or of "previous chaste character." In New York, it has been held that if the female has previously fallen from virtue, but has subsequently reformed, she is within the latter phrase. *Carpenter v. People*, 8 Barb. 603. But in other States it is held that a female must be possessed of actual personal virtue and to have a good reputation for virtue is not enough. Therefore, if a single act of illicit intercourse can be charged to her account she does not fill the bill, and no one can "abduct" her, because though her reputation may be as pure as was that of Cæsar's wife, the one slip is enough. *Lyon v. State*, 52 Ind. 426; *Slocum v. People*, 90 Ill. 274.

The girl must be taken out of the possession of her parents or guardians—a mere seduction while she is at home is not within the statute. *People v. Parshall*, 6 Park. 129. But if the girl is induced by persuasion or enticements, to go not further than the immediate neighborhood, even only to the next house to that of her parents, or for only a short time, she continuing to live at home right along, yet if this is done for the purpose of prostitution, it is enough. *Slocum v. People*, 90 Ill. 274.

Nevertheless, as held in the principal case, it is essential that the purpose shall be *prostitution* and not simply criminal connection with the abductor or any one else. And *prostitution* is defined by the best authorities as the common lewdness of a woman for gain; the life of a public strumpet. *State v. Ruhl*, 8 Ia. 454. "The case suggested by counsel," said Baker, J., in an Illinois case, "where a young woman living with her parents is induced or enticed by a man to leave home and meet him for a few hours and have illicit intercourse with him within a few rods of her home, after which she returns to her parents' house as usual, is clearly not within the scope of the statute, as it lacks at least one ingredient, if not more, necessary to constitute the offense. It lacks the ingredient of an intention to reduce the female to a condition of either common prostitution or concubinage." *Slocum v. People*, 90 Ill. 274. The facts of a recent Maine case illustrate this principle better than a mere statement of the legal rule. A young unmarried woman living with her parents went down to the railroad depot one evening to meet her music teacher. Instead of the music teacher she met Mr. Stoyell, with whom she had only a slight acquaintance. Mr. S. must have been a very fascinating man—in the language of the period a "masher"—for he soon persuaded her not to waste time hunting for her teacher, but to take a little ride with him on the

train, which was just starting for a neighboring town, promising her that they would drive back together in a carriage, in a couple of hours. When the railroad ride was over he took a carriage and drove her to a hotel instead of home. He took her into a room and ordered wine, of which she drank. He filled her with the liquor until she was pretty drunk and then went to bed with her. They stayed at the hotel two days, when she repented and went back to her home, although Stoyell tried hard to persuade her to take a trip with him to the sea shore, on the ground that she might as well be hung for a sheep as a lamb. The courts thought it a hard case, but were nevertheless, compelled to decide that Stoyell was not guilty of abduction. "Nothing," said the Chief Justice, "indicates a desire on his part to make her a common prostitute. However infamous the conduct of the defendant, however deserving of punishment he may be, he cannot be legally convicted of nor punished for a crime he has never committed." *State v. Stoyell*, 54 Me. 24.

*KIDNAPPING.***HADDEN v. PEOPLE.**

[25 N. Y. 878.]

The good ship West Point, lying in New York harbor and ready to weigh anchor for Liverpool, was short of sailors. A man named Hadden, who was in the business of providing ships with sailors, undertook to supply the West Point, and started out to carry out his contract. About this time Robert Wallace who had just been paid off at the Brooklyn Navy Yard from the San Jacinto man-of-war, was coming over the East River on the ferry to see his friends in New York. At Fulton Market Hadden espied Wallace, and knowing him to be a sailor "by the cut of his jib," joined him in conversation and invited him to drink. Wallace accepted the invitation, and was taken to Hadden's house, where he was treated to liquor until he was so much confused that when he and Hadden left the house he had no idea where they were going. In fact, he had no recollection of what occurred afterwards until next day when he found himself in the forecastle of the West Point.

Wallace succeeded in getting away and had Hadden indicted for kidnapping. He was convicted. "Procuring the intoxication of Wallace, with the design of getting him on board the ship in that condition, without his consent, and thus taking him on board, was a kidnapping within the meaning of the statute as much

so as if it had been done by force, overcoming his resistance when in full strength. * * * No object for the deception and wrong which was practiced upon Wallace can be discovered except to have him sent out of the State or held to service as a sailor against his will on board the West Point."

Kidnapping is the forcible abduction or stealing away of a man, woman, or child, from his or her own country, and sending or taking him or her into another, against their will. It differs from "abduction" in this that the person seized shall be taken or intended to be taken *from his own to another country*. But any one of the States is "another country," within this definition; and so where a person in New Hampshire seized a negro boy in that State for the purpose of taking him to Alabama and selling him into slavery, it was held that he was guilty of kidnapping. *State v. Rollins*, 8 N. H. 550.

The strict letter of the definition of kidnapping requires the employment of physical force to render the act an offense. But this is by no means requisite. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence. Therefore, it is very properly held that any threats, fraud, or appeals to the fears of the individual which subjects the will of the person abducted, and places him as fully under the control of the other, as if actual force were employed, makes the offense as complete as if force and violence had been used. *Moody v. People*, 20 Ill. 815.

FALSE IMPRISONMENT.

SMITH v. STATE.

[7 Humph. 43.]

Mr. Rodgers, with his horse and wagon, was carried over the Chucky River by Smith, who was a public ferryman. "Your fare, if you please," said Smith when they reached the other side. "Why, I paid you when I got on board," replied Rodgers. "You did nothing of the kind," retorted Smith, "and you don't leave this boat till the money is in my hand."

Not wishing to have a fight, which seemed probable if he tried to force his way out, Rodgers paid the demand, having been detained on the boat about fifteen minutes.

But Rodgers had his revenge. He caused Smith to be indicted for false imprisonment, and he was convicted. "To make out the offense as charged," said the court, "no actual force was necessary; but if the opposition to the prosecutor's going forward was such

as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

False imprisonment is the restraint of a person against his will, and without legal cause. The common law was always so jealous of the personal liberty of the citizen that it punished very severely the infringement of this right even to the smallest extent. A man preventing another by threats or force from passing along the highway renders himself liable to a prosecution for false imprisonment. *Bloomer v. State*, 3 Sneed, 66.

In an Illinois case Samuel Fletcher shut up his child, who was blind, in a cold and damp cellar without fire, for several days in the middle of winter. The boy finally escaped from his dungeon and was taken in charge by the town authorities, who prosecuted the father for false imprisonment. He was convicted and fined. *Fletcher v. People*, 52 Ill. 895. This is, however, by no means a precedent for prosecuting the parents of the bad boy who is shut up in his room or in a closet until he behaves himself, or as a punishment for telling a lie, or for disobedience of some kind. The law gives parents this authority over their children, and will only interfere (as in the Fletcher case) where they go beyond the bounds of reason and humanity.

Bolts and bars are not essential to the imprisonment, nor need force be used to hold the party. In an old case a constable showed a man a magistrate's warrant, and told him he must go before the magistrate. The man went willingly without any compulsion, but afterward finding that the warrant was no warrant, he prosecuted the constable; and the court decided that there had been a false imprisonment, the man having only yielded to what he considered a legal necessity. *Harris Cr. L.* 157. And to prevent a man by threats from going where he pleases and has a right to go, constitutes the offense. *Herring v. State*, 8 Tex. (App.) 108. In another Texas case, one Kaufman had rented a farm which Woods claimed to own. One morning Kaufman was in the field ready to plough, when Woods and some of his friends came up and told him that he should plough no more. As they emphasized their demands with shotguns, Kaufman stopped ploughing. The Woods party being afterwards tried for false imprisonment, it appeared that they had not forbidden Kaufman to go where he pleased, but had simply countermanded the ploughing. The court

said this made no difference, and the parties were convicted. "It is a sufficient imprisonment," explained the judge, "to stop a man from going in any direction he may think proper; and it is not necessary that he be detained in any particular spot so long as he is prevented from moving from place to place, or in the direction he wishes to go." *Woods v. State*, 3 Tex. (App.) 204.

A case similar to that of Smith, the ferryman, occurred on one of the New York elevated railroads in 1882. The custom then was for passengers to purchase their tickets when they entered the station and drop them in a box as they left the station at the end of their ride. Mr. Lynch having purchased a ticket from the Forty-second Street station to the Rector Street station, entered one of the cars. Before reaching his destination he lost his ticket, and when at Rector Street he attempted to pass from the station platform through the gate into the street, he was stopped by the gatekeeper. He explained that he had paid his fare and lost his ticket, and insisted upon passing out, but was pushed back by the gate-keeper, who would not let him out, but kept him in the depot until a policeman came, and took him to the police court. When the magistrate heard his story he let him go; and Mr. Lynch, as it was a corporation he was dealing with, instead of prosecuting the company criminally, sued them for damages. They pleaded that the gate-keeper had only carried out a rule of the company. But the judges thought this very "fresh." They thought a rule that a passenger should be detained even for failure to pay his fare an unreasonable one. "Is it not," said Dykman, J., "an imprisonment for debt, with the creditor for prosecutor, tribunal, and gaoler, and the right of appeal denied. A few will lose tickets and the many will not. The defendant may arrogate to itself power of detention and hold a threat over its passengers, but it exercises such power at its peril. The power to eject a passenger from its car and to use force to do so is one power. Power to detain is power to imprison dressed in the garb of softer words." *Lynch v. Metropolitan Elevated R. Co.*, 24 Hun, 506. And in the Court of Appeals the judges were even more indignant. "The defendant," said Earl, J., "had a right to make reasonable rules and regulations for the management of its business and the conduct of its passengers. It could require every passenger before entering one of its cars to procure a ticket and to produce and deliver up the ticket at the end of his passage or again pay his fare. The defendant had such a regulation, and no com-

plaint can be made of that. But it had no regulation, and could legally have none that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and if he did not, that he should be then and there detained and imprisoned until he did do so. At most, the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid." *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77.

But there must be something in the nature of force or of taking away the will to constitute the offense. Mr. Garrison who lived in Macon, N. C., was called out of bed one cold night by some parties who said they were hunting for a stolen horse, and who asked him to join them, as he knew the roads. On being promised pay for his trouble he went down and was given a seat on a horse behind the rider. The party galloped very fast and Garrison was very much shaken up; and presently he complained of feeling sore, when they advised him to change horses. When he dismounted the whole party rode off, and left him in the dark to find his way home as best he could. They were not looking for a horse at all, but had used the ruse for the purpose of playing a practical joke on Garrison. The old man thought it practical enough to have the whole party indicted for false imprisonment. But the court decided that they could not be convicted. "The prosecutor," said Ashe, J., "was left all the while to the exercise of his own free will. There was no violence, no touching of his person, no threat, no intimidation of any sort, and the ruse employed by the defendants to decoy him from his house we do not think was such a fraud as to impress the transaction with the character of a criminal act." *State v. Lunsford*, 81 N. C. 528.

Of course the defendant may justify the imprisonment—as for example that he saw him commit a crime and held him until the officer of the law came, (*Barber v. State*, 18 Fla. 675; 1 Green, C. L. Rep. 723); or that he procured his arrest under a warrant, always presuming that the warrant is a legal and regular warrant—for if it is not it is no protection. *Floyd v. State*, 12 Ark. 43.

All that the prosecution has to prove is the imprisonment; for it is presumed to be unlawful until a justification for it is shown. *Harris Cr. L. 157; Kirbie v. State*, 5 Tex. (App.) 60.

*ASSAULT.***STATE v. DAVIS.**

[1 Ired. (L.) 125; 35 Am. Dec. 785.]

Three men had a quarrel one fine afternoon. Davis was one of them and Roberts was another; as to the third, history is silent. The quarrel seemed over when Davis, who was leading his horse by the bridle, said to a bystander, "Hold my horse and I'll whip the rascal," and advanced with his arms extended to where Roberts stood. Davis, however, got the worst of it, for before he could grasp Roberts, the latter, with a rifle he held in his hands, knocked him down.

Nevertheless Davis was held to have committed an assault. "An assault," said the judge, "is an intentional attempt by violence to do an injury to the person of another. * * * And it must also amount to an attempt, for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Therefore, it is that notwithstanding many ancient opinions to the contrary, it is now settled that no words can, of themselves, amount to an assault. And, therefore, also, it is said not to be an assault, if a man strike at another at such a distance that he cannot reach him or put him in fear. The distance is here explanatory of the apparent attempt to strike,

and shows that in truth that it is not an attempt—but only a menace—to do hurt to his person. It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any act, which if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted. Thus riding after a person so as to compel him to run into a garden for shelter to avoid being beaten, has been adjudged to be an assault.¹ So in a late case before a very eminent English judge, it was held that where the defendant was advancing in a threatening attitude with intent to strike the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, an assault was committed.² In the case under consideration, the intent of the defendant to seize the prosecutor's person was not in question."

An *assault* is an offer or attempt by force or gesture to commit violence on the person of another. A *battery* is a touching or laying hold of another person or his clothes, in an angry, rude or hostile manner. Thus if a man strikes at another with his cane or his fist, or throws a bottle at him, if he miss it is an assault; if he hit, it is a battery. Harris C. L. 151.

There may be an assault without personal injury, as any attempt at violence is an assault, though the party fail to commit the violence intended. An attack apparently likely to hurt is as much an assault as if it had actually caused harm, as shooting at another or striking at him with a cane, stick, or fist, though the shot or blow miss; or raising a stick near enough with intent to strike, though

¹ Morton v. Shopple, 3 C. & P. 371.

² Stephens v. Meyers, 4 C. & P. 349.

the party assailed retreats. That the attack was frustrated or intercepted makes no difference, as where one advances in a threatening manner, but is stopped before he reaches his object. *Desty C. L.* 180.

It is not necessary that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary, and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will receive a blow unless he resist or retreat, the assault is complete. *People v. Yslas*, 27 Cal. 684. So, for a man to ride his horse so near another as to endanger his person and create a belief in his mind that he intends to ride over him, is an assault. *State v. Sims*, 3 *Stroh*. 187.

It has been held in some cases, and has been strongly maintained by a very eminent authority on criminal law (2 *Green Cr. L. Rep.* 275, note to *Com. v. White*), that to render an act an indictable assault, the assailant must have the ability to commit a battery in the manner of his menace. Therefore, it is said, to point an unloaded gun or pistol at a person within shooting distance, is not an assault. This is expressly laid down in Texas in several cases. See *McKay v. State*, 44 Tex. 43. On the other hand, in Massachusetts, a contrary view is taken. *Sullivan and Harrington* in that State, with pick and shovel, were mending the highway along which the defendant drove in a wagon. "Drive in the middle of the road, can't ye?" shouted *Sullivan*, to which order the defendant politely replied with an oath. "What do you mean?" said *Sullivan*. "I mean this," answered the defendant, taking a double barreled shot-gun out of his wagon and pointing it at the road menders. "I have got something here that will pick the eyes out of you." The road menders wailed and the defendant went on his way without further discussion. The defendant was afterwards indicted for assault, and pleaded that the gun was not loaded at the time. But the judges said this made no difference, for that if the road menders were put in fear by the gun being pointed at them, and they had reasonable cause for their fear, this was enough—whether the gun was loaded or unloaded—and he was found guilty. *Com. v. White*, 110 Mass. 407.

These very opposite decisions go to indicate that in Texas, to point a fire arm at a man is considered a kind of a joke, while in Massachusetts it is a very serious thing. I confess that I like the Massachusetts rule the best. If it is an assault, as all agree it is, to flourish a cane in a man's face, or to shake your fist at him, I

think it ought to be so, also, to shove an unloaded pistol under your nose. How are you to know he is not going to pound you over the head with it? Even if he is too far away for this and only within shooting range, yet if I think the pistol is loaded is there not that "putting in fear," which goes to constitute an assault? I am for the Massachusetts rule, for the still better reason also that unloaded guns so often go off.

*ASSAULT AND BATTERY.***STATE v. BAKER.**

[65 N. C. 832.]

Baker and Barber were talking politics in a country store when Baker said to Barber: "I once thought we were friends; but I understand you have said things about me, and you have got to take it back." Barber replied that he was not that kind of a man, and took nothing back. Then Baker put his open hand on Barber's breast and pushed him a few steps, when he fell over a flour barrel.

Being convicted of assault and battery, Baker appealed, and his counsel argued as follows: —

"It was at a country store where politeness is not a commodity."

"Suppose this to be so," replied the Supreme Court, "and make full allowance for country manners, still there may be rudeness at a country store; and if this was not, then rudeness can not be."

"The hand was open," persisted the counsel.

"So it would have been if he had slapped his face," said the court.

"Putting the hand on a person is an equivocal act, and may have been friendly," said the counsel as a last hope.

"Doubtless," replied the court. "It is true that a laying on of the hand may be friendly, but here the defendant said at the time that it was not in friendship. 'I once thought we were friends,' said he. And he preceded the act by a threat. And the act itself was so violent and insolent as to make it unequivocal."

Whereupon the conviction was affirmed.

The least violence to another is a battery. Taking hold of a man's coat or laying the hand upon his person, if done in friendship or for any benevolent purpose, would clearly not be an assault and battery, but if done in anger, or in a rude and insolent manner, it certainly would. *U. S. v. Ortega*, 4 Wash. 585. Where one woman who was painting in a room upstairs sprinkled a few drops of paint on a creditor, also a female, who was passing along the sidewalk, this was held sufficient to constitute an assault and battery. *People v. McMurray*, 1 *Wheel.* 62. So to spit on a person or throw water or anything else on his clothes; or to cut another's dress without touching the person (*Reg. v. Day*, 1 *Cox*, 207); or to fondle a person (especially a female) against their will. In an English case some parties, for the purpose of abandoning an infant child, put it in a bag and hung it on the palings of a fence exposed to the inclemency of the weather. This was held enough to constitute the offense. *Reg. v. March*, 1 *C. & K.* 497.

Force of some kind on the person is the gist of battery. One Buzzell had two bank notes in his hand which he was going to put up on a bet made by Ordway, but before he could do so Ordway snatched them from his hand and ran away. The court held that there was no assault and battery, there being no touching of the person. *Com. v. Ordway*, 12 *Cush.* 270. But where there is the least resistance overcome it is an assault and battery — the force necessary is present. Mooney and Gorham knowing that Lohell had a roll of bills in his pocket, laid for him. Mooney put his left arm around Lohell's neck and his mouth to Lohell's ear, pretending to whisper something, and while Lohell was listening he put his

hand in his pocket. But Loheil felt the hand and there was a struggle before Mooney got his hand out of the pocket. It was held that Mooney was guilty of an assault with intent to rob. *State v. Gorham*, 55 N. H. 152.

ASSAULT—FORCE MAY BE INTERNAL.**COMMONWEALTH v. STRATTON.**

[114 Mass. 303.]

A young man who wanted his sweetheart to be less cold than she was, obtained from a quack some love powders which he was assured were the very thing for such a case. The next time he called on her he had some nice figs in his pocket in which some of the powders were concealed. The young lady, of course, liked figs and it was therefore an easy matter to get her to take the medicine in this disguise. But instead of making her amorous, the love powders made her sick, and when, after a good deal of pain, she got well, her lover was indicted for assault.

“Although force and violence,” said the court, “are included in all definitions of assault and battery, yet where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. * * * If one should hand an explosive substance to another and induce him to take it, by misrepresenting or concealing the dangerous qualities,

and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery and that would necessarily include an assault, although he might not be guilty even of an assault, if the substance failed to explode, or failed to cause any injury. It would be the same if it exploded in the mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it can not be material whether it acts upon the person injured externally or internally, by mechanical or chemical force."

And the lover was therefore convicted.

This case is a very important one, deciding as it does that to constitute an assault application of force may be external or internal. This may be said to be the American law, as the opinion of a court of so high a character as that by which this decision was rendered, is not likely to be overruled or dissented from. It is not, however, the English law. In 1838 Edward Button who was a waiter at an inn in London, bought two pence worth of Spanish files which he put into the coffee which had been prepared for the bar-maids' breakfast. When the girls drank the coffee they thought it rather bitter, and were shortly afterwards taken very sick. A doctor who was summoned, analyzed what was left in the coffee pot, and it was afterwards discovered that Button was the guilty man, for on being accused of it, he said he did it only for a lark. The judges convicted him of assault. *Reg. v. Button*, 8 C. & P. 660. But seven or eight years after this, where a couple of practical jokers had put some cantharides in the ale of which a bridal party partook, which caused bride and bridesmaids, as well as the groom and his friends, to send for the doctor in a hurry, the jokers escaped, the Queen's Bench holding that the injury must be external, unless the intent was to kill, in which case it was punishable as a higher crime. *Queen v. Walkden*, 1 Cox, 282. And this case has been since approved by others of the English judges. *Reg. v. Hanson*, 2 C. & K. 918.

I was going to tell the student that as there are such opposite conclusions on this subject, he might take his choice as to which is the correct law. But if he lives in the United States he had, perhaps, better accept *Com. v. Stratton*, for the reasons which I have adverted to.

ASSAULT AND BATTERY—FORCE MUST BE UNLAWFUL.

STATE v. MIZNER.

[45 Ia. 24.]

Miss Ida Breemer, when she entered the district school at Rossville, Ia., as a scholar, told the teacher that she was just twenty years of age. Now, she knew that she was telling a fib when she said this, but as no pupils over twenty-one years old were allowed in the school, and as she was of age, she told a lie in order to be admitted. As might have been expected, Ida was not a good pupil; she was very hard to govern; and so, one day, when she had again broken one of the school rules, Mr. Mizner, the principal, called her up to the desk and gave her a good whipping,—just what she deserved.

Ida was, of course, very mad; and when she got out of school she went straight to the police court and

had the schoolmaster charged with an assault. But the court said that he was right. "A teacher, for the maintenance of his authority and the enforcement of discipline, may legally inflict reasonable chastisement upon a pupil."

And the court further held "that the fact that Ida was twenty-one made no difference, for, although she was not a legal scholar, still she had by her deception voluntarily become a pupil, and could not escape the duties and liabilities of one."

The force used must, in order to constitute an assault, be *unlawfully used*. A man, for example, lays his hand on another's arm to attract his attention, or a person in a crowd is pushed against another,—in neither of these cases is there any assault. So, if a person in falling catches hold of another to save himself, this is no offense. In an old case, a man was throwing some skins from his window into his yard, when a heavy gust of wind passed by and blew one of the skins over the fence and into a pedestrian's eye. The man was held not guilty of any offense, for he had been only doing what he had a right to do. *Rex v. Gill*, 1 Strange, 190.

But besides these very simple and obvious examples, there are a number of cases where, by the law, force may lawfully be applied. These cases may very properly be divided into seven, viz: —

1. *Husband and wife.* At common law, a husband was permitted to moderately whip his wife. The judges put this right on the ground that as he was held to answer for her misbehavior,—to respond for both her contracts and her torts,—he ought to have the power to control her. But he was not allowed to use a stick thicker than his thumb. This right is obsolete in the United States, though several early cases favor it. But a judge in the Dominion, the other day, held it still to be the prerogative of the husbands of Canada.

2. *Parent and child.* Every parent may correct his child by corporal punishment. The law on this point is well summed up by a Tennessee judge thus: "The right of parents to chastise their

refractory and disobedient children is so necessary to the government of families and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence or of calling upon them to account for the manner of its exercise, upon light or frivolous pretenses. But at the same time that the law has created and preserved this right, in its regard for the safety of the child, it has prescribed bounds beyond which it shall not be carried. In chastising a child, the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offense." *Johnson v. State*, 2 *Humph.* 288. Mr. Neal, of Georgia, found out what was moderate chastisement of a child. Having left his daughter, who was ten years of age, at home, with strict injunctions that she should not enter the cupboard, he found, when he returned, that she had disobeyed him. He went out and got an old saw, with which he belabored her until the skin on her back was broken and the marks of the saw-teeth were thick upon her. All the judges agreed that Neal was guilty of assault and battery, saying: "Even if a whipping was justifiable, and we would not go closely in a matter of this kind, as a very large margin must be left to the judgment of the parent, such a whipping with such a weapon was a cruel and outrageous abuse of the parental authority, and made the perpetrator of it guilty." *Neal v. State*, 54 *Ga.* 281. In a North Carolina case, the distinction between legal and illegal chastisement is said to be this: Such punishment as may seriously endanger life, limb, or health, or disfigure the child, or cause any other permanent injury, is immoderate. On the other hand, any corporal correction which produces temporary pain only,—no matter how severe,—and no permanent injury, is moderate, and within the law. *State v. Alvord*, 68 *N. C.* 322.

3. *Guardian and ward.* The same rule, with the same limitation as to moderation, applies to corporal punishment by a guardian inflicted on his ward. *Stanfield v. State*, 48 *Tex.* 167.

4. *Master and servant.* A master is not permitted to inflict corporal punishment on a hired servant. *Com. v. Beard*, 1 *Ashm.* 267. But to this rule there appears to be an exception as to three descriptions of servants, viz.: sailors, soldiers, and apprentices; the power being allowed in the two former cases to prevent mutiny,

and in the latter, because the master stands in the place of the parent. *Davis v. State*, 6 Tex. (App.) 188.

5. *Officers of the law.* An officer in making an arrest may use force. A gaoler may inflict corporal punishment on a convict for the purpose of enforcing or punishing the violation of the rules of the prison; and the same is true of the superintendent of a poor-house. *State v. Hull*, 34 Conn. 182. But in all such cases the force used must be no more than is required for the exigency of the case; for if the officer go beyond this, he is guilty of an assault and battery, or, if it result in death, of homicide.

It seems that the law does not recognize the rules of discipline of voluntary associations when they go beyond what is legal. A young woman, who was a member of a benevolent society called the "Good Samaritans," for some reason became liable to expulsion. The ceremony of expulsion in this order consisted in suspending the member from the wall by means of a cord fastened around her. The female who made all the trouble in this case had seen the ceremony performed on others, but when it came to her turn, she objected and made such a struggle that a good deal of her clothing was torn off before the society was through with her. "When the prosecutor," said the court, "refused to submit to the ceremony of expulsion established by the benevolent society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery had the parties concerned not been members of the society of Good Samaritans, it is none the less a battery because they were all members of that humane institution." And the Samaritans were found guilty. *State v. Williams*, 75 N.-C. 184. Of course, if she had consented to the ceremony there could have been no assault. See *post*, p. 208.

6. *Enforcing a right.* So, it is not an assault and battery to use force to enforce a right given by the law. A conductor of a railroad train has a right to eject passengers not paying their fare or violating the reasonable rules of the company. If necessary, therefore, he may use force, and such use of force is not a crime. *People v. Caryl*, 3 Park. 326. And so may a church sexton, in keeping peace in the church or enforcing its rules. *Com. v. Dougherty*, 107 Mass. 248. Other instances of this are frequent. But in all cases the force must not be beyond what is necessary for the object.

7. *Defense of person or property.* A person is justified in using force to repel an assailant. This principle is discussed at length further on. *Post*, p. 251.

ASSAULT AND BATTERY—CONSENT A DEFENSE.

STATE v. BECK.

[1 Hill (S. C.) 368; 26 Am. Dec. 190].

A good many years ago, in South Carolina, a party of men started out to find a thief. They found him. His name was Anderson. As they were taking him to jail somebody raised the query whether he would rather be whipped or imprisoned. He said he would rather be whipped, and asked one of the party named Beck to whip him. Beck declined the job at first, but on Anderson's persisting in his request, he complied saying, "If it will oblige you, I will do it." He then gave him a few cuts with a switch, and let him go. But it turned out that the whipping did not save the thief, he was arrested and sent to jail just the same. When he had served his sentence he had Beck hauled up for assault and battery. But the court held that he was not guilty. "A surgeon," said Judge Harper, "who for his patient's health cuts off a limb is not guilty of mayhem; or if one plucks a drowning man out of a river by the hair of the head, this is no assault. If,

according to the prescription of the physician in the Arabian Nights, a physician should beat his patient with a mallet for the *bona fide* purpose of restoring his health, though this may be a malpractice, it would be no battery. * * * The defendant had no evil disposition towards Anderson, but the contrary, and at his own earnest request, and to save him from what he considered a greater evil, reluctantly consented to inflict the stripes. However ill-judged the act may have been, I cannot think it constituted an assault and battery."

If consent did not excuse what would otherwise be an assault, the gaols would be pretty full, and the public treasury rich in fines. The young man who attempted to kiss his sweetheart or who, after an amicable struggle succeeded, would be guilty of an assault or a battery. For this reason, where two men go out and fight a prize fight, and one pummels the other very badly, he cannot be guilty of an assault, for there is consent, and the consent of a grown up man. *Champer v. State*, 14 Ohio St. 437. The prize fighter would not go scot free for he might be punished for a breach of the peace or an affray.

A person cannot, however, legally consent to the infliction on himself of a "maim" (as to what is a maim see more particularly *post*, p. 225) or of death, or of an injury likely to cause death. A., for example, gets B. to cut off A.'s right leg in order that A. may avoid labor and be enabled to beg. This is a maim, and A.'s consent is immaterial. A. and B. agree to fight a duel with deadly weapons. If either is killed or maimed, the consent of the other is immaterial. Mr. Justice Stephen suggests that the words "for any purpose injurious to the public" should be added to the first sentence of this paragraph. "It seems absurd to say," he remarks, "that if A. gets a dentist to pull out a front tooth of A.'s because it is unsightly, though not diseased, A. and the dentist both commit a misdemeanor. When it was an essential part of a common soldier's drill to bite cartridges, I believe that it was not an uncommon military offense to get the front teeth pulled out, and this would, I presume, be an offense at common law also."

But *submission is not consent*, and therefore, an apparent consent, which is the result of incapacity, fear, fraud, or ignorance, is no defense.

Consent through fear. The case of *Reg. v. Nichol*, R. & R. 130, is usually referred to as the leading authority on this branch of the law. A schoolmaster was indicted for assault on one of his female scholars by taking indecent liberties with her. The girl had never objected, because she was afraid of the schoolmaster, and it was held that this vitiated the consent, and he was convicted. "There is a difference," said Coleridge, J., in another case, "between consent and submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was *not* consenting; on the other hand the mere submission of a child when in the power of a strong man and most probably acted upon by fear can by no means be taken to be such a consent as will justify the prisoner in point of law." *Reg. v. Day*, 9 C. & P. 722.

Consent through ignorance or fraud. In Dover, England, Mary Impitt, a girl fourteen years old, was sent to a doctor to be treated for a menstrual difficulty. He gave her some medicine and told her to call in a week. When she came back at the end of this time and told him that she was no better,— "Then I must try some further means with you," he said, and told her to lie down. She did so, and he had carnal connection with her, she making no resistance because she thought that what was going on was a new kind of medical treatment. It was held that the doctor was guilty of an assault, because she had been deceived as to the nature of the act, and her consent had been obtained by fraud. *Reg. v. Case*, 4 Cox, 220. As to consent vitiated by ignorance, *Reg. v. Sinclair*, 18 Cox, 28, is the best authority in point. Sinclair had connection with a girl twelve years old, who made no complaint; but afterwards her mother discovered that she was suffering from gonorrhœa which had been communicated to her by him. He was convicted of assault, the judge laying down the law to the jury in these words: "If he knew he had such a disease and that the probable consequence would be its communication to the girl, and she in ignorance of it consented to the connection, and you are satisfied she would not have consented if she had known the fact, then the consent is vitiated." The Massachusetts case (*ante*, p. 200), where the young man gave his girl love powders, concealed in figs, which made her very sick, is another example of consent through ignorance and fraud.

Consent through incapacity. A person asleep may submit to an assault, or an idiot, or a drunken person; but such submission will not amount to a legal consent which will excuse the assault.

*WORDS NOT AN ASSAULT.***COMMONWEALTH v. EYRE.**

[1 S. & R. 349.]

In a ship-yard in Philadelphia some calkers were at work one Sunday. Mr. Price, who was a justice of the peace, happening along just then was greatly shocked thereat, and went in to expostulate with the heathen. Inside the yard he found Eyre, the owner, who did not take his reproof very kindly. High words ensued and Eyre raised his hand and said to the justice: "If it were not for your grey hairs I would tear your heart out." Upon this the justice left and the next day Eyre was charged with assault.

The court, however, considered that the crime was not made out, for the reason that the words used at the time explained the action, and took away the idea of any intention to strike on the part of the ship-builder.

Words alone will not constitute an assault and the phrase "tongue lashing," is in this view of the law a misnomer. And the words used may, as the principal case shows, render what would otherwise be an assault, a harmless action. This is for the reason that to make the crime complete there must be both *act* and *intention*. In a very old case where a man laid his hand on his sword and said: "If it were not assize time I would not take such language from you," all the judges agreed that it was not an assault, for the declaration was that he would not assault him, the judges being so near; and the intention as well as the act go to make an assault. *Tuberville v. Savage*, 1 Mod. 8. So where one, Crow, raised his

whip and shouted at old man Grayson, saying: "If you were not an old man, I would knock you down," this was held not to constitute an assault. "The law," said Daniel, J., "makes allowance to some extent, for the angry passions and infirmities of man. It seems to us that the words used by the defendant contemporaneously with the act of raising his whip, were to be taken into consideration, as tending to qualify that act and show that he had no intention to strike." *State v. Crow*, 1 Ired. (L.) 375.

But the qualifying words must be unequivocal. Mr. Samuel Hampton's case illustrates the extent of the rule very well. As John Lindsay was going down stairs with the crowd which was leaving the court-house at recess, Samuel who was in front of him and very near, turned round and with his hand clenched remarked to John: "I have a great mind to hit you." It was held that this was an assault. "This," said the court, "was an offer of violence and constituted an assault, unless there was something accompanying the act which qualified it and indicated that there was no purpose of violence. The only accompaniment of the act was the declaration, 'I have a good mind to strike you.' If the declaration had been, 'I intend to strike you,' that would not have qualified the act favorably for the defendant. Nor if he had said, 'I have a mind to strike you.' It is suggested, however, that the expression 'I have a great mind to strike,' is used to express indecision; as if one should say, 'I had a great mind to do so and so, but I did not,' indicating that he was only debating in his own mind as to whether he would or would not. If that were the common acceptance of the expression, it would not avail the defendant, because when violence is apparently offered, the qualifying declaration must not be equivocal, but unequivocal, so as to leave the person attacked no good reason to suppose the violence will be executed." *State v. Hampton*, 63 N. C. 18.

ASSAULT—UNLAWFUL CONDITION.

STATE v. MORGAN.

[3 Ired. (L.) 186; 38 Am. Dec. 714.]

A constable went to Morgan's house and levied on a gun which was there, but, at his wife's request, agreed not to take it away till Morgan came home. When Morgan arrived he was very much put out, and demanded of the constable that he should give the gun up. The constable showed his authority and refused. Then Morgan seized an ax and holding it over the constable's head, said: "Give up the gun or I'll split you down." In this state of the case the constable weakened and agreed to a compromise, and Morgan got back his gun.

It was held that in raising the ax Morgan had been guilty of an assault, and that the words he used at the time did not alter the case. "To every purpose," said the court, "both in fact and in law, the attack on the prosecutor was begun — and in the pause which intervened before its consummation, most happily for both parties, an arrangement was made which prevented the probably fatal result. But this pause — though intentional and announced when the attack

began — does not prevent that attack from being an offer or attempt to strike. If a ruffian were to level his rifle at a traveler, and announce to him that he might have fifteen minutes to make his peace with his God, and the unfortunate man should save his life by prayers, by remonstrance, by money, or by any other means, before the expiration of that time, could it be pretended that there had been no attempt nor offer to hurt him, because the intent was not to kill him instantaneously, and therefore did not accompany the act? Will it be doubted if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence, because the purpose to kill was not absolute, but conditional merely? Whenever the act is done in part execution of a purpose of violence — whether that purpose be absolute or provisional — makes no difference as respects the question, whether the act be an assault. In both cases the assailant equally violates the public peace. In both he breaks down the barrier which the law has erected for the security of the citizen. In the former he sets up none in its place. In the latter he substitutes for it the protection of his grace and favor."

This case shows that an offer of violence is an assault, even if it be accompanied with a declaration that violence will be forborne upon a condition which the actor has no right to impose. For example, if a man says to another, at the same time making a motion to strike, "I will strike you if you do not pull off your hat," this is an assault, because he had no right to require the hat to be pulled off. *State v. Church*, 63 N. C. 15. In this case, which was church all round, the defendant, Church, was sitting outside a church before morning service, when a worshiper came up the steps. Church rose and drawing a pistol, remarked to him: "We have no

use for you in this company, you shall not come here; go back." The worshiper concluded that he could do without divine service that morning under the circumstances, and retired. Mr. Church was held rightly convicted of an assault.

ASSAULT WITH INTENT TO MURDER.**TATUM v. STATE.**

[59 Ga. 638.]

Let the judge tell the story of this crime in his own words: —

“ Two brothers set out from Haralson County, Georgia, to find a better country. They had with them two satchels, a pistol, a mule, and a watch. They intended to go to Cherokee County. As they journeyed in that direction, a stranger who traveled on foot and carried a stick, a pistol, and a satchel, overtook them and prevailed upon them to change their destination. He was going to Tennessee, and wanted them to go with him. Satisfied with the inducements which he mentioned, they consented, and for four days the party went on amicably together. The mule served first one and then another, the stranger taking his turn on the saddle with the rest. On the night of the fourth day they lodged in an uninhabited house. Their bed was an old door-shutter placed in front of the fire. Some-time before day the next morning the brothers arose

and found the stranger already up. Leaving him up, they lay down again and fell asleep. While they slept he assaulted one of them violently with his stick, inflicting a dangerous wound on the head, and in the struggle which ensued, dislocating or injuring severely two fingers of the hand. The other brother, awakened by the noise, and calling out to know what was the matter, was also attacked with the stick and beaten on the head. The brothers escaped from the house, and the stranger went through in the darkness and did not return. The assault commenced and ended in silence. The motive and purpose of it were left unexplained."

The stranger, whose name was Tatum, was subsequently apprehended, tried and convicted of assault with intent to murder, and on appeal all the judges of the Supreme Court agreed that this was right. His acts indicated an intent to murder.

The term "assault" is often used to include an act of violence—though, as we have seen, (*ante*, p. 194) it includes, in the strict sense of the term as used in the law, only an offer or attempt to use violence—the actual use of force being called "battery." And as there can be no force used without the attempt on the part of the aggressor, the offense of battery has come to be called "assault and battery," while the word "battery" alone would certainly be sufficient; or the word "assault"—leaving the "assault" as now used in the law to be described as an attempt to commit an assault. This nomenclature would seem to be more convenient, and would be less confusing when we find that, as a matter of fact, the judges constantly speak of a battery as an assault.

Assaults (using the word to include both the offer and the violence used) are of two kinds, *common* (sometimes called simple) and *felonious* (sometimes called aggravated).

A *common assault* is one committed with no intent to commit a greater injury.

A *felonious* assault is one committed with the intent to commit some additional crime.

In the preceding cases (*ante*, pp. 193-216) we have considered only common assaults. We turn our attention now to felonious assaults, premising that they are always more severely punished than common assaults. These may be divided as follows:—

1. Assaults with intent to kill.
2. Assaults with intent to murder.
3. Assaults with intent to commit rape.
4. Assaults with a deadly weapon.
5. Mayhem.

1, 2. *Assaults with intent to kill or murder.* "There is a well recognized distinction between an assault with intent to murder and an assault with intent to kill. In the former case the proof must be such as shows that if death had been caused by the assault, the assailant would have been guilty of murder; and in the latter case the proof need only be such as that, had death ensued, the crime would have been manslaughter. In the former case the intent must be the result of malice aforethought, and in the latter the result of sudden passion or emotion without time for deliberation or reflection." *State v. Reed*, 40 Vt. 606. In order to constitute the crime of assault with intent to murder there must (with the distinction shown above) be an attempt by violence to do an act indicating—by the surrounding circumstances—an intent to take life. But unless there is something in the surrounding circumstances to show such an intent, the aggressor can not be convicted of this high crime. Thus, where nothing is shown to prove such an intent except that the prisoner presented a pistol, loaded and cocked, at another in an angry manner, he can not be convicted of assault with intent to murder. *Morgan v. State*, 83 Ala. 413.

3. *Assaults with intent to commit rape.* See *Com. v. Merrill, post*, p. 221.

4. *Assaults with a deadly weapon.* An assault with a deadly weapon is an aggravated assault—for the reason that great bodily harm, even the taking of life, is possible or may have been intended. A "deadly weapon" does not mean only a weapon or instrument which is made and designed for offensive or defensive purposes; but includes an instrument by which a person may be

killed or grievously wounded. So where a man assaulted and cut another with a chisel, he was held to have used a deadly weapon. *Com. v. Branham*, 8 Bush, 387; 1 Green Cr. L. Rep. 523.

5. *Mayhem*. See *State v. Girkin, post*, p. 225.

*ASSAULT WITH INTENT TO COMMIT RAPE.***COMMONWEALTH v. MERRILL.**

[14 Gray, 415.]

Mr. Orlando Merrill rose from his bed one night and taking a lamp, stole up to a room on the floor above where he knew a young girl slept all alone. Finding her asleep "he (to follow the words of the reporter) " touched her gently to ascertain whether she was awake, raised the clothes and examined and applied his hand to her private parts for half an hour, desisting whenever she seemed to start or likely to awake. Finally she awoke and sat up in bed, put the clothes down and said she wished he would go away. He asked her to let him have connection with her, and offered her money, but she refused. He then got into her bed, continuing to urge her to consent to his wishes. She still refused and told him to go away or she would call her mother. He lay upon the bed for half an hour or more and then went down stairs to his own room. He did not take hold of her at all or use any force except as stated above."

Merrill was subsequently indicted for and convicted of an assault with intent to commit a rape. But on appeal to the Supreme Court, the judges were unanimously agreed that he was not guilty of this offense. It did not appear that he intended to have carnal knowledge of the prosecutrix *by force and against*

her will, which was the gist of the offense. "There was ample proof of gross indecency and lewdness and of an attempt by long continued and urgent solicitations and inducements to lead the girl to consent to the wish of the prisoner to have sexual intercourse with her. These facts would have been sufficient to warrant a jury in finding the prisoner guilty of an assault. But there was an entire absence of all evidence of the use of force. There was proof of no act of violence, no struggle, no outcry and no attempt to restrain or confine the person of the prosecutrix which constitute the usual, proper and essential evidence in support of the charge of an intent to accomplish a felonious purpose on the body of a female by force and against her will."

To constitute a crime of assault with intent to commit rape, an intent that the carnal knowledge shall be accomplished by force and against the will of the woman must appear from the facts of the case. "Obviously," as said in a Texas case, "there is a manifest distinction between an assault with an intent to commit rape and an assault with intent to have an improper connection. Any such violent or indecent familiarity with the person of a female against her will, when the latter is the purpose and intent of the aggressor, is an assault and should be punished as such. But whatever may be the brutally obscene character of the assault, if it appear from the evidence that it was not the object or intent of the aggressor to accomplish his desired purpose by force against the will and without the consent of the female, then the more aggravated offense has not been committed." *Pefferling v. State*, 40 Tex. 486. Merrill's case above is a good example of this distinction; and so is the earlier case of *Com. v. Field*, 4 Leigh, 648, where a man intending to have carnal knowledge of a woman while she was asleep, slipped into her bed, but while he was pulling up her night-gown she awoke and he immediately fled. Here, as in Merrell's case, the court held him not guilty, for it would be ridiculous to say that he intended to effect his object "forcibly and against her will."

There is an absurd case in North Carolina which ought not to be overlooked here, as an example both of what is *not* the law and of the effect in many instances even in courts of justice of the prejudices of race and politics. A negro was indicted for assault with intent to commit rape. The prosecutrix, a white woman, having parted from a companion, started to go home alone through the woods. She heard the prisoner — a negro — call out to her to stop, and saw him running after her about seventy yards distant. She ran, and was pursued by the negro about a quarter of a mile, when, coming near a dwelling-house, he turned back and ran off, not having during the chase caught up with her. A majority of the court affirmed the conviction. The opinion of the chief justice is certainly unique: "I see a chicken-cock drop his wings and take after a hen; my experience and observation assure me that his purpose is sexual intercourse; no other evidence is needed. Whether the cock supposes that the hen is running by female instinct, to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt; as for instance, if she is a setting hen and makes flight, not merely amorous resistance. There may be evidence from experience and observation of the nature of the animals and of male and female instincts, fit to be left to the jury upon all of the circumstances and surroundings of the case. Was the pursuit made with the expectation that he would be gratified, voluntarily, or was it made with the intent to have his will against her will and force? Upon this case of the cock and the hen, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female instincts. Again: I see a dog in hot pursuit of a rabbit; my experience and observation assure me that the intent of the dog is to kill the rabbit; no doubt about that, and yet, according to the argument of the prisoner's counsel, there is no evidence of intent. * * * The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was to kill her or to rob her, so that the intent must have been to have sexual intercourse; and the jury, *considering that he was a negro*, (Is the presumption of virtue in the Caucasian a *presumptio juris et de jure*?) "and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house and the instinct of nature, as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to

find that the intent was to commit rape." This was presuming an intent with a vengeance. I remember that this decision was received by the profession generally as a joke. The more it came to be read the more it was laughed at, until at last it was actually laughed out of court, and the other judges (the chief justice having meanwhile been gathered to his fathers) in a later case thought it necessary to overrule the preceding one in positive language. *State v. Neely*, 74 N. C. 425.

*MAYHEM OR MAIM.***STATE v. GIRKIN.**

[1 Ired. (L.) 121.]

This was a rough and tumble fight, from which James Watson emerged with a part of his ear missing. The defendant was subsequently charged with mayhem in biting off the lost ear. Now, it was clear that the defendant had done the biting, but as mayhem (disfiguring a person) is a very serious crime (as we shall afterwards see) he tried to escape a conviction on the ground (1) that he did not intend to disfigure Watson, and (2) that as his whole ear did not come off, but only a small piece, he was not "disfigured" within the statute.

But the court decided against him on both points. As to the first it said that having done the act, they must presume he intended the result; and to the second they said: —

"The object of the Legislature was to protect individuals from such injuries as disfigure, that is to say, alter and impair the natural personal appearance. Where, therefore, the injury reaches that extent the case must be within the meaning of the act. Here

such is the case. For, although the ear be not entirely severed from the head yet certainly enough was taken off to attract observation, and to ordinary observation to render the person less comely."

Mayhem at common law is depriving a person of the use of such of his members as he needs for fighting purposes, either of attack or defense. It was treated as a very grave offense against the State, for it reduced the number of men capable of military service. "Therefore," saith one of the old writers, "the cutting off or disabling or weakening of a man's hand or finger" (preventing him from drawing a sword or pulling a trigger to advantage) "or striking out his eye or foretooth" (obscuring his sight when he took aim at an enemy, and bothering him considerably when he came to bite off the end of his cartridge which was the method *ante* the days of breech loaders), "or castrating him" (for obvious reasons) "are said to be mayhem, but the cutting off of his ear or nose are not esteemed maims because they do not weaken, but only disfigure him." Hawk. Pl. Cr. 107. To these may be added cutting off or disabling his leg or foot, whereby he would be impeded in the attack or retreat. 3 Black. Com. 131.

On the other hand, even hitting a man over the head hard enough to crack his skull, was not mayhem, for if it killed him it was murder, and if he got well, why it did not injure his fighting qualities. *Foster v. People*, 50 N. Y. 605.

The common law at first punished mayhem according to the Mosaic law — an eye for an eye and a tooth for a tooth — but later it was made a most aggravated species of assault and a felony, and was punished most severely.

It is a felony in most of the States; and it has been extended by statute so as to include all malicious disabling of the person, and such acts as biting off an ear or slitting a nose, if the injury amounts to a disfigurement. The American statutes generally use the word "maim" instead of "mayhem," giving to the former word the meaning of the latter at common law, and a little more.

It was necessary that the injury should be permanent, and so a temporary injury to the finger, arm, eye, or other fighting member was not mayhem. *State v. Briley*, 8 Port. 473. But as Girkin's Case decides, under the statutes the gist of the crime where it does not disable, is that it disfigures.

And it seems that the fact that the injured member having been put back, grew again in its proper place, is no defense. *Slattery v. State*, 41 Tex. 619. There are some things like the shattered vase that once destroyed can never be restored, and a nose or a tooth, in the eye of the law at least, seems to be one of them.

RAPE — FORCE AND RESISTANCE REQUISITE.**PEOPLE v. DOHRING.**

[59 N. Y. 874.]

In a pleasant house near Niagara Falls, lived an old man by the name of Dohring. He was the owner of the place, and his family were all away on a visit for a few weeks. There were likewise servants in the house. And there was also living in the house a young girl by the name of Frederica. One hot afternoon, the young girl by the name of Frederica was playing in the barn among the hay with some children. The old man by the name of Dohring came into the barn, told the children to run home, and fastened the barn door. He did not tell the young girl by the name of Frederica to run home; on the contrary he threw her over on the hay, and told her that if she would let him do what he wanted to, he would buy her a new dress. The young girl by the name of Frederica said that she had dresses enough, and that what he proposed would get her in the family way. But the old man by the name of Dohring insisted that there was no fear of that and completed his purpose. The young girl by the name of Ferderica cried all the time, and tried to get away, but could not.

The old man by the name of Dohring was indicted for rape, and the judge told the jury that if he had

committed the act by force and against the will and resistance of the young girl by the name of Frederica they should find him guilty. So they very promptly found him guilty ; and it looked very bad for that old man by the name of Dohring.

The Appellate Court, however, came to his rescue. They said that it did not appear that the young woman by the name of Frederica had resisted to the utmost of her powers — and without this the crime of rape could not be committed. "The resistance," said Folger, J., "must be up to the point of being overpowered by actual force or of inability from loss of strength longer to resist, or from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death. In the case here there is no evidence of inability from loss of strength longer to resist; there was but one for the prosecutrix to oppose and he a man in years; there was no duress or reason to fear death; there were no threats; instead thereof there were promises and words of palliation and persuasion; there was nothing to show that resistance was absolutely useless; she had possession of her faculties of mind and body and retained her consciousness; she was then capable of resistance up to the point of being overpowered by actual force. * * * Is it not the law of this crime that the woman must have resisted to the extent of her ability on the occasion on which she alleges that this grievous wrong was done her? * * * And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion must it not be that she is not entirely

reluctant? If consent, though not express, enters into her conduct, there is no rape."

Rape is the carnal knowledge of a woman by force against her consent. It was long ago pointed out by a very eminent man (Lord Hale) who gave some very startling instances within his own experience of false charges of this character, that this was an accusation easily made, and hard to be defended by one ever so innocent. For which reason, the courts require it to be proved beyond a shadow of a doubt. Juries are often less particular, and the very fact that the charge is made and sworn to by the woman is sometimes sufficient to cause them to find the man guilty. The appellate courts have frequently to reverse verdicts on the ground (a very uncommon one in any other species of crime) that the facts do not justify the verdict.

It was for this reason that the Supreme Court of Wisconsin, a few years ago, reversed a conviction of rape, because the trial judge had neglected to tell the jury that prejudice was likely to be aroused against a man charged with such a crime; that it was a charge easy to make and hard to disprove; that if the woman's consent was ever given, no matter how tardily or after how much force, it was not rape, and that the former good reputation of the prisoner ought to have weight in his favor on such a charge. *Connors v. State*, 47 Wis. 528.

The elements of the crime of rape are these, the carnal connection being proved, (1) *force*, (2) *want of consent*.

1. *Force a requisite.* "Force" does not mean the force which is always essential to the act of copulation—but means "force" which is necessary to overcome the resistance of the woman. And "force" is not restricted to the positive exertion of actual physical violence in the act of compelling the submission of the female to the copulation. Threats sufficient to create such an apprehension of bodily harm that the female dare not but comply are enough. There was no physical force used on Lovisa Towers, who charged Joseph Strong with having raped her in the woods one night, for it appeared that she had gone voluntarily with Joseph into the woods knowing what was going to take place. But he had told her that if she did not go with him and do as he wanted, he would take her where no one would know her fate. Lovisa was only sixteen years old, was several miles from home, alone with Strong, and no one within call-

ing distance, and she believed that he meant by this to kill her if she did not go. It was held that Strong was guilty of rape. *Strong v. People*, 24 Mich. 1.

That fraud is not force, see *Saunder's Case* and notes, *post*, p. 285.

2. *Want of consent.* That the act is against the woman's consent can only be shown by her conduct. Therefore, if she does not do her very best to resist it, the presumption is that she did not entirely object to it. There must be the *utmost reluctance and the utmost resistance* on the woman's part—unless the female be a very young child, in which case she is presumed incapable of giving consent, and that she did not resist is no defense.

But force may be internal (as we have seen in the case in assault, *ante*, p. 200) as well as external. So, taking away a woman's power to consent by drugs will be as much accomplished by force as if done with a blow. Therefore, where a man made a girl drunk, and violated her while in that condition, she refusing to accede to his wishes until her senses were completely overpowered by the liquor, it was held that he was guilty of rape. *Reg. v. Champlin*, Den. C. C. 89; 1 C. & K. 749.

And force being thus essential to rape, any arts or devices by which the woman's moral nature is so corrupted as to make her less able to resist will not take its place. A physician in California took a girl for a drive one evening, and wound up by inviting her to rest a little while in his office. While there he had intercourse with her. He used no force, but the girl testified that his lewd conduct during the drive made her feel so dull and stupid as not to understand the nature of the subsequent act. The jury convicted him, but the Supreme Court reversed the judgment, because they had not distinguished between the *force*, which constitutes rape, and the mere blandishments of the seducer. *People v. Royal*, 53 Cal. 62.

The "passive policy" as said by one judge, will not do. A Missouri case has become more notorious than celebrated in this connection. A sixteen-year old girl named Anna Rorschach, charged William Burgdorf with rape, and he was convicted in the St. Louis Criminal Court. On appeal the conviction was set aside as wrong: "Whether we consider," said the judge, "the *place* of the reputed offense (a house but a few feet distant from one in which two families were then living) the early hour in the evening at which it is said to have occurred, or the *manner* of its alleged perpetration (viz., the seizure by the defendant of both the girl's

hands in one of his, the holding of them behind her back, and while thus still holding them, seating himself in a chair, raising one of her legs with one hand and the other leg with his *foot*, pulling her *astraddle* of his lap, consummating the outrage and this too while holding the table on which was a lighted lamp with his other hand, and thus preventing her from pushing him over as she says the second time) the story of the girl is to the last degree improbable. In addition to this she is contradicted by Hammell, a witness on the part of the State, who was peeping through a crack of the door, only some seven or eight feet distant, and who reiterates the statement that though he 'heard a kind of screaming at first, the girl made no outcry *while* the offense was being perpetrated; and that after the defendant laid down his pipe and took her by the arm and placed her in the position above referred to she seemed to be satisfied, and that she also caught hold of the table with the lighted lamp on it; and the lamp *stood still*.' " The italics are the judge's, not mine. For these reasons the court thought the charge very thin. "The *passive policy*, or a mere *half-way* case," said Sherwood, J., "will not do. It certainly must have been a *very amicable struggle* indeed which would inflict no bruises on the girl, cause no outrages during its continuance, and leave the lighted lamp standing still upon the table, which in the effort for supremacy was grasped by both contestants. In a word this was not the conduct of a woman zealous of her chastity, shuddering at the bare thought of dishonor and flying from pollution. Had it not been for the *tell-tale crack* in the door we, doubtless, would have never heard from the case." *State v. Burgdorf*, 53 Mo. 65.

The phrase the "utmost resistance" is, of course, a relative one, to be applied to the case in point. The resistance may be required to be more violent and prolonged in one woman on account of her physical condition than in another, or in one set of circumstances than in another. In one case a woman may be surprised at the outset, and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed upon that she cannot struggle. But whatever the circumstances may be, there must be the greatest effort of which she is capable to foil the pursuer and preserve her person.

And if the woman, though she resists at first, eventually gives in and consents, it is no rape. *Conners v. State*, 47 Wis. 528. In an English case eight men came to the house of one Mary Madden one night; and, breaking in the door, seized and held her with her back against the wall, all of them committing the offense one af-

ter the other. While she was trying to keep them out of the house she called out, "It is too bad for so many to be attacking one poor girl; but if you will go away and come one at a time I will do what I can to satisfy you." The men being indicted for rape, Coleridge, J., said to the jury: "It is well worthy of your consideration whether, although she at first objected, she might not afterwards, on finding that the prisoners were determined, have yielded to them and in some degree consented, when you come to consider that she herself told them that she should make no objection if they came one at a time." The jury acquitted the men. *Reg. v. Hallett*, 9 C. & P. 748. The case of the young girl by the name of *Frederica, ante*, p. 228) is a good illustration of this rule, though a Wisconsin case is, perhaps, as striking an example of how much the courts require of the woman as any to be found in the books. A woman in Milwaukee charged a man named Whittaker with raping her. Her story as to her objections was as follows: "I tried my best I could, and I couldn't do any more, I got so tired out. I tried to save me so much as I could, but I couldn't save myself. and he held me and tried to do what he was made to do, and I couldn't help myself any more. He had my hands tight and my feet tight, and I couldn't move from my place even, and of course at last I worked so much as I could *and I gave up.*" The jury convicted Whittaker, but the Supreme Court thought it wrong. "There is nothing," said they, "to distinguish this case from ordinary cases where the resistance and dissent ought to have continued to the last, and where the physical power of the woman must have been overcome by physical force to make the act rape. A threat of personal injury is the usual accompaniment of such cases. In this class of cases the authorities seem to be uniform that the act must be committed against the will of the woman and without her consent, not technically, but actually and in fact, or it will not be rape." *Whittaker v. State*, 50 Wis. 519; 1 Am. Cr. Rep. 391.

It is generally necessary to prove that the woman made an immediate complaint of the matter. This is required in order to show that the charge is not an afterthought — the result of jealousy or spite, or the altered relations of the parties. So when a girl in Georgia made no charge until after she became so big with child that the neighbors discovered her condition, this circumstance was held sufficient to disprove the charge. *Crockett v. State*, 49 Ga. 185.

It is hardly ever permitted to convict on the testimony of the woman alone — there must be some corroboration of her story. So

the accused may show that she was not strictly virtuous, for the reason that no impartial mind would be apt to resist the conclusion that a female of this kind would not be so apt to resist as one who is spotless and pure. *Benstine v. State*, 2 Lea, 169.

It remains to be added that a boy under fourteen years of age can not in England (see *ante*, p. 3), be convicted of a rape, he being presumed too young to be capable of committing it, and that a husband can not commit the crime on his wife, as her continuing consent is presumed to be given by the marriage contract.

The crimes of *sodomy*, *buggery*, and *bestiality* — known as crimes against nature — are of too rare occurrence, or at least are too seldom brought to the attention of courts, to require any definition or description here.

Seduction. This is not an offense at common law, for the rather convincing reason that there is no wrong about it in which the prosecutrix does not take an equal share. In some of the States it is made a crime by statute when the woman is under a certain age — eighteen in Ohio — and is of chaste character, and the act is accomplished under a promise of marriage. Seduction is accomplished by enticement and promises; if by force it is not seduction, but rape.

Incest is the intermarriage or cohabitation of two persons of the opposite sex related to each other within certain degrees.

*RAPE—FRAUD NOT FORCE.***REG. v. SAUNDERS.**

[8 C. & P. 265.]

Mrs. Cleary and her husband boarded with a Mr. Saunders. One Sunday night she and her husband went to bed rather early, and she soon fell asleep. Some time afterwards she was awakened by feeling a hand passing round her, but supposing it to be her husband's, she made no resistance to that or to the connection which followed. Afterwards she discovered by the breathing that it was not her husband at all, and calling out, the man jumped out of the bed and ran out of the room. It turned out that Mr. Cleary had taken some pills before he went to bed, and being obliged to get up and go down stairs in the middle of the night, Saunders had slipped in and taken his place. Mrs. Cleary felt so mortified the next day that she tried to hang herself, but nevertheless it was held that Saunders was not guilty of rape. "I am bound to tell you," said the judge to the jury, "that the evidence in this case does not establish the charge contained in this indictment, as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband."

The essence of the crime of rape, it should be remembered, is not the fact of intercourse, which is a lawful act under ordinary circumstances; but it is the injury and outrage to the modesty and

feelings of a woman by having a connection forced upon her against her will and in spite of her protests. *Pennsylvania v. Sullivan*, Add. 148. Therefore, where the woman consents, the fact that her consent was obtained by fraud (as held in *Saunders*' case above, and many others both English and American; see *Reg. v. Williams*, 8 C. & P. 286; *Rex v. Jackson*, R. & R. 480; *Queen v. Barron*, L. R. 1 C. C. R. 156; *Wyatt v. State*, 1 Swan. 394), does not render her consent any less a consent; and the crime of rape is not committed. For in such cases the woman's will is exercised, though it is exercised under the influence of fraud. Some courts, looking only at the fact that a very grievous wrong has been committed, in such a case as that of *Saunders* above, have declared that it must be punished, forgetting that it can not possibly come within the definition of rape; and forgetting, too, that if "not obtained by fraud" were to be added to the definition, it would include cases which it would be absurd to include. A man may obtain the consent of a woman to marriage by fraud, by concealing the fact that he has another wife living, or by representing himself to be a rich man when he is a pauper. If, after they had lived together some time, she should discover the truth, would he be indictable for rape? He would, if the old definition were intrenched upon in the way suggested, for was not her consent to the connection obtained by fraud? The fact is that the law, as administered by our courts, would be much more of a science if the judges would stick to principles, and not try to stretch this rule and narrow that, in order to suit their disgust at a particular act and their desire to punish it or not as the case may be. Hard cases, it has been well said, make bad law. In Scotland they have what they call "innominate offenses," or crimes without a name, which the judges, when the particular facts of a case do not bring it within the definition of any named crime, punish under this head if they think the offender deserves punishment. From this wide net criminals find it difficult to escape. I commend this hard Scotch sense to the attention of our Legislatures.

In the city of Detroit there was a foreign quack named Santiago Don Moran, who claimed to be able to cure consumption every time. Farmer Jackson had a sick daughter, and, having seen the advertisement, he took her into the city to be treated, and left her at Don Moran's house while he went about his business in the city. The quack examined the girl very gravely, and announced to her that the "whites" had collected in her stomach, and that to save her life it would be necessary to enlarge her parts so that they would

pass off; that he could do it with instruments, but the operation might kill her; that the only safe way was for him to have connection with her. Miss Jackson objected to this rather unusual prescription, when the quack replied that it was what he did to all women with her complaint, and that he had told her father that it was necessary, who agreed that it ought to be done in this way—all of which was, of course, untrue. The girl believing what he said to be true, withdrew her objections, and Don Moran had connection with her. The quack was afterwards indicted for rape, and the judge told the jury that if they believed that Miss Jackson would not have given her consent but for his false representation, they should find him guilty. They found him guilty. But in the Supreme Court this was held all wrong, for the reason that there was no "force" used by the quack to accomplish his purpose, and the fraud did not take the place of force. *Don Moran v. People.* 25 Mich. 356.

Therefore, to have connection with a woman while in a state of natural sleep—an insensibility not brought about by the prisoner, is not held to be rape in Scotland, and in several cases in the United States. *Charles v. State*, 11 Ark. 389; *Com. v. Fields*, 4 Leigh, 648. But as said in one case: "Had the sleep in which the woman was been induced by felonious practices, such as the use of drugs, the case would have assumed a different aspect. The will might then have been justly alleged to have been overcome with a view to the possession of her person without her consent; just as in the case where through fear and dread, by threats of death, the woman has been thrown into a state of prostration, or as when through such threats, or through actual personal violence at the first meeting of the parties, she has been thrown into a swoon, and then her person ravished, the crime might be held properly charged." *Reg. v. Sweenie*, 8 Cox, 228.

It was held once in England that an idiot cannot give consent (*Queen v. Barrett*, L. R. 2 C. C. R. 81); but this doctrine was soon qualified so as to stand thus: Unless she is so far capable of will as to permit the act from mere sexual instinct, although she does not understand its nature. *Queen v. Fletcher*, L. R. 1 C. C. R. 39. In an American case, the absurdity of holding that a connection with an insane woman without the use of force was rape was pointed out, and it was ruled that such an act could not be rape. This is holding fast to the principles of the law, unaffected by the hardship of the case—though in this particular instance it appeared that the woman's insanity took the form of a morbid sexual desire,

and it might have been inferred that the woman and not the man was the soliciting party. Cooley, J., in his opinion pointed out to what result a different rule would lead. "As marriage with an insane person is void, it might become a serious question whether the ceremony could protect the too partial bridegroom from prosecution for rape, where he had relied upon manifestations which to him appeared the evidences of genius, but which experts should convince a jury were only the vagaries of a disordered imagination." *Croswell v. People*, 18 Mich. 427. The case of very young children stands on a very different ground. It is a well known fact that the child at an early age is without desire for such intercourse, and the presumption of law is thus raised that any connection is against her will—which presumption is in accordance with the general fact. *Croswell v. People*, 18 Mich. 438.

But all these acts, would, as we have seen, be considered assaults and punishable as such. *Ante*, p. 210.

HOMICIDE — JUSTIFIABLE — RESISTING ARREST.**STATE v. ROANE.**

[2 Dev. (L.) 60.]

One night Mr. Roane, asleep in his own house, was awakened by hearing his dog bark. He got up, seized a gun and, opening a window, saw a man going from the yard through the gate into the road. He called out, "Who is there?" but receiving no answer, fired. He dressed and went out, and then found that he had killed the negro servant of a neighbor just as he had his hand on the gate to open it.

Mr. Roane being indicted for the killing of the negro, set up among other defenses his right to arrest a man who had been committing a felony. But the court said he had not shown a single fact to bring his case within this right. "In the first place," said Henderson, J., "when an individual commits a homicide upon the ground of making an arrest, he must show a felony committed, if not by the person killed at least by some one, and secondly, that he made known his object, to wit: that it was only to arrest; that the criminal, or supposed criminal, refused to submit, and that the killing was necessary to make the arrest."

Homicide is the killing of a human being. There are two kinds of homicide, viz.: *Justifiable* or *excusable*, and *felonious*.

Justifiable or excusable homicide is where the life of a human being is taken under circumstances in which the law requires it to be taken or does not prohibit it. These cases are usually five in number, as follows:—

1. Where an officer executes a legal duty.
2. Where an officer or other person kills one who is resisting the law.
3. Where the killing is to prevent a forcible and atrocious crime.
4. Where the killing is in self-defense.
5. Where the killing is accidental.

Formerly the first three of these were classed as justifiable homicides, and the last two as excusable ones. The difference proceeded from the fact that in the former cases the killer was engaged in an act which the law required to be done, while in the latter he did a thing which the law only negatively did not prohibit. "The reason usually given," it has been said, "is that in both the forms of excusable homicide there may be some degree of blame attributable. In the first case, i.e., self-defense, inasmuch as in quarrels usually both parties are, to some extent, in fault; in the second, i.e., accident, the party may not have used sufficient caution." Harris C. L. 128. Formerly this distinction was substantial, for while the latter was not punished at all, in the former, though the slayer escaped with his life, he had his goods forfeited. But in modern times there is practically no distinction, the verdict of "not guilty" being returned whenever the circumstances under which the homicide takes place, show a justification or an excuse.

1. *Where an officer executes a legal duty.* For example, when the proper officer executes a criminal in strict conformity with the legal sentence. The criminal must have been found guilty by a competent tribunal, and no one but the proper officer may act the part of executioner. Thus, for any one to kill the greatest of malefactors even on his way from the jail to the gallows would be murder. In an early case in Massachusetts a parricide who had been convicted and was to be executed the next morning, was visited during the night by a friend named Bowen, who urged him to hang himself, and thus disappoint the crowds who were gathering outside to see him strung up. The murderer of his father did so, and disappointed the audience. Chief Justice Parker ruled, and so told the jury, that if they should find that Bowen had advised the parricide to kill

himself, and that he had done so in consequence of this advice, Bowen was guilty of murder. "It may be thought," said the judge, "singular and unjust that the life of a man should be forfeited merely because he had been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals [but not now when executions are private. Rep.] and to take such an one out of the reach of the law is no trivial offense. Further, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of this offense in the least degree diminished by the consideration that justice was thirsting for its sacrifice; and that but a small portion of his earthly existence could in any event remain to him." *Com. v. Bowen*, 18 Mass. 356. So the sentence must be strictly carried out by the officer — for him to behead a criminal whose sentence was hanging or *vice versa*, would be murder.

2. *Where an officer or other person kills one who is resisting the law.* An officer with a warrant, or a person knowing a felony to have been committed, is justified in killing one accused of a felony if he resists or flies, or attempts to escape after he is apprehended. But he has no such right when his process is civil and not criminal. Nor has he the right where it is a misdemeanor and not a felony which the criminal is being, or has been, arrested for. Vineyard Thomas was arrested by a constable for assault and battery, taken before a justice and fined. Not being able to pay he was committed to the county jail, and Officer Reneau started out with him to take him there. *En route* Vineyard broke from him and commenced to run away. The officer called out to him to halt, but not being obeyed, he fired two shots at him, one of which took effect, killing him instantly. It was held that the officer was guilty of murder or manslaughter, according as he did or did not intend to kill Vineyard. *Reneau v. State*, 2 Lea, 720.

And it is essential that the killing was necessary; in other words that it was the only thing that could be done to make the arrest or prevent the escape. As very well put by the Supreme Court of Tennessee in a recent case: "Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of firearms or dangerous weapons, and that they will not be excused for taking life in any case where, with diligence or caution,

the prisoner could be otherwise held." *Reneau v. State*, 2 Lea, 720. A justice of the peace in Alabama issued a warrant charging a man named Walker with having stolen a coat, and put it into the hands of Constable Clemens to execute. When the constable found Walker, the latter was very loud in his declarations that no one should search him; they would have his dead body to walk over first. The constable went back and reported the state of affairs to the justice, who issued another warrant against Walker. The constable took this and started out for a second attempt. He found Walker at work on a railroad track with his coat off, and commanded him to surrender and consider himself under arrest. To which Walker replied, "By God, you can't arrest me," and springing to his coat, which was near by, was in the act of drawing a pistol from his pocket when the constable drew his weapon and shot and killed him. The court thought that the shooting was unnecessary, and that the mere attitude of resistance (the warrant being for a misdemeanor) did not justify the officer. *Clemens v. State*, 50 Ala. 117.

State v. Roane, *ante*, gives the other requisites to the justification of a killing in this way.

3. *When the killing is to prevent a forcible and atrocious crime.* As to this see *post*, p. 255.

4. *When the killing is in self-defense.* See *post* p. 251.

5. *When the killing is accidental.* See *post*, p. 269.

Suicide is murder,—self-murder; but it is a crime which escapes punishment because the criminal being dead cannot be tried by a human tribunal. Formerly the penalty was a forfeiture of all goods and chattels and a burial at the cross roads "with a stake in his inside," as Tom Hood puts it. As we have seen (*Bowen's Case, ante*, p. 240), if one persuades another to kill himself and he does so, the adviser is guilty of murder, and if two persons mutually agree to commit suicide, which intention is so badly carried out that only one succeeds, the survivor is guilty of murder. A husband and wife being in extreme poverty and great distress of mind were conversing together on their unfortunate condition, when the husband said, "I am weary of life, and will destroy myself." "If you do, I will too," the wife responded. The husband then went out and having bought some poison mixed it with some drink, of which they both partook. The draught did its work so far as the husband was concerned, but the wife, not

being able to stand the pain, seized a bottle of salad oil, which was near at hand that acted as an antidote, and she recovered. It was decided that except as she was acting under compulsion of her husband (ante, p. 4) she was guilty of his murder. *Reg. v. Alison*, 8 C. & P. 418. A late case in Massachusetts is of interest here. Lucy Mink was very much in love with Charley Ricker, to whom she was engaged. The course of true love, however, did not run smoothly, and one evening when they were sitting together Charley informed her that he intended to break off the engagement and see her no more. Lucy was wild at this announcement, and rushing to her trunk took a pistol from it, and placed it at her forehead. Before she could draw the trigger, Charley had seized her, but in the struggle the weapon went off, and Charley was killed. There was not the slightest evidence to show that she had an intention of shooting Charley, yet the court held that her intention being to commit suicide she was guilty of homicide, manslaughter certainly, and perhaps murder. *Com. v. Mink*, 128 Mass. 422.

HOMICIDE—MURDER—MALICE.**ERRINGTON'S CASE.**

[2 Lew. 217.]

William Lee was very drunk when he left a tavern where he had been carousing half the night. As he stumbled home he commenced to feel tired, and seeing a greenhouse near the road, he staggered into it and was soon asleep. In the morning two of the gardeners coming to rake up the fires, discovered the intruder, and with a rather rude idea of what constitutes a joke, put a lot of straw around him, and then a shovel of hot cinders upon him. Lee did not wake up at once, the consequence of which was that the straw ignited and he was burned to death.

The gardeners were indicted for murder, and their defense was that they did not intend to kill the drunkard. There was no evidence of express malice on their part towards him, for they had never seen him before. But the court held that if they intended to do any serious harm to Lee, though they had no idea of killing him, they were guilty of murder.

Homicide has two divisions: *murder* and *manslaughter*.

Murder is the unlawful killing of a human being by a person of sound memory and discretion *with malice aforethought either express or implied*. This definition with the words in italics omitted defines

manslaughter. The requisites to the crime of murder are these four: —

1. The unlawful killing.
2. A human being
3. A person of sound memory and discretion.
4. Malice aforethought, either express or implied.

1. *The unlawful killing.* This means that the killing must be without justification or excuse. The cases of justifiable or excusable killing have been already discussed, *ante*, p. 239. The killing which is not justifiable or excusable may be in every form, — poisoning, striking, starving, drowning, or any other method of causing death. But it is not, rather curiously, considered murder to take away a man's life by convicting him of a capital crime on perjured evidence. But murder, as we have seen, may be committed by nonfeasance. *Ante*, p. 89.

It is no defense that the deceased was in ill health, and likely to die any way when the wound was given; or had been already mortally wounded. *People v. Ah Fat*, 48 Cal. 61. So it makes no difference that the party dies not by the wound, but from the effect of surgical treatment which the wound required to be had. For example, A. wounds B. in a duel. Competent surgeons perform an operation, which they in good faith regard as necessary. B. dies of the operation, and it turns out that the surgeons were mistaken as to the necessity of the operation. Nevertheless A. is guilty of the murder of B. However, if the treatment is negligent, the doctors, and not the party giving the wound, is responsible. A. wounds B. C., a surgeon, applies poison to the wound, either from malice or negligence. If B. dies of the wound, C., and not A., has murdered B. *State v. Bantley*, 44 Conn. 537. In an English case, a man had severely cut another with an iron instrument on the hand, and the latter refusing to have his fingers amputated, as advised to do, at the end of a few days lockjaw came on. The fingers were then amputated, but too late, and he died. The court held that a party inflicting a wound which ultimately becomes the cause of death is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Reg. v. Holland*, 2 M. & R. 851. The murderer, in short, cannot throw the blame on his victim, and say that if he had taken better care of himself he would not have died.

But the death must happen within a year and a day after the

wound is given, otherwise the crime is not murder — the law presuming that after that length of time, the party died from some other cause than that of the injury received so long before.

2. *A human being.* In order to constitute murder the killing must be of a person in being, *i.e.*, born alive. If the killing be of a child still unborn, though the mother be in an advanced state of pregnancy, it is no murder. *State v. Winthrop*, 48 Ia. 519.

3. *A person of sound memory and discretion.* This requisite has been already fully discussed. *Ante*, p. 10. As to the burden of proof of insanity, see *post*, p. 249.

Malice aforethought either express or implied. Malice is either express, as where antecedent threats of vengeance or other circumstances show clearly that the criminal purpose was really entertained or *implied*, as when though no express criminal intention is proved by direct evidence, it is necessarily inferred from all the circumstances of the case. *May Cr. L.* 189. The word "malice" has not, in the definition of murder, the restricted meaning given to the word as ordinarily used. It does not mean only a wicked mind or malevolence or ill will — but while including all this it means likewise in the law, a general felonious design or intention. Thus it includes not only an intention to kill or do bodily harm to a person, but also the knowledge that a particular act will probably cause death or bodily harm or an intention to commit any kind of felony. A. for example, for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street, and kills a number of persons. A. commits murder, although he intends to kill nobody and even hopes that nobody will be killed. He is held, however, to have acted with "malice" in the legal sense, in having done a thing which is likely to kill, or having done it in carrying out a felony, *i.e.*, assisting the escape of the prisoner. *Steph. Cr. L.* 168.

The word "aforethought" does not require the entertaining of the malice for any length of time. Having the intent but an instant before the execution of the crime is sufficient. As to implied malice, it is laid down in a very leading case, already referred to (*Com. v. York*, *ante*, p. 48.), that a killing being proved with a deadly weapon, the presumption of law is that it is malicious and an act of murder. But this view is not the law in some States in this country, the view taken by their courts being that when the facts are equivocal and may or may not attend a malicious killing, it is for the prosecution to show that it was malicious. See *May Cr. L.* 141.

The common law recognized no degrees of murder. It was murder or manslaughter or nothing. "The common law made no distinction between the guilt of the poisoner, or the assassin who shot his victim from ambush, or the robber who killed for gain, and the man who under the influence of a momentary passion, engendered by a real or supposed grievance (not amounting to a legal provocation), slew the supposed aggressor. The common sense of mankind makes a distinction and regards the prisoner and assassin with abhorrence and loathing, but while condemning the act of the man who slays in passion without sufficient cause, regards him as far less criminal than the man who murders for gain, or poisons, or assassinates for revenge." Henry, J., in *State v. Wieners*, 66 Mo. 26. These motives have acted upon the Legislatures of nearly all the American States which have graded the crime, punishing only the first degree with death. In the year 1794, Pennsylvania passed the first statute of this kind, and its provisions have been copied almost literally by all the other States.

By that statute, murder perpetrated (1) by poison, or lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, or (2) which is willful, deliberate and premeditated, is murder in the first degree.

All other kinds of murder at common law are murder in the second degree.

The first class is easily understood. What is to be considered as "willful, deliberate and premeditated," has been a more difficult question.

In the first place, the three constituents must all be present to constitute murder in the first degree.

1. *The killing must be willful.* This means that there must be a specific intent to take life — the gist of all murder — whether it be the life of the person slain or some other person.

2. *The killing must be deliberate and premeditated.* It has been said in a leading case to be no easy matter to distinguish between the words deliberation and premeditation. Premeditation means thought of beforehand, even for a moment. Deliberation means the execution of that intent not under the influence of passion, but in furtherance of the formed design.

"What then," it is said in the case already cited, "is murder in the second degree? It is the wrongful killing of a human being with malice aforethought, but without deliberation. It is when the intent to kill is, in the heat of passion, executed the instant it is con-

ceived, or before there has been time for the person to subside. We do not use the phrase 'heat of passion,' in its technical sense, but as a condition of mind contradistinguished from a cool state of the blood. Take the case of A. and B., who had been on friendly terms; but they have an altercation in which A. calls B. a liar, and with a pistol or other deadly weapon, B. instantly, in a passion engendered by the insult, kills him. This at common law was murder, but lacking the element of deliberation, it is, under our statute, murder in the second degree." *State v. Wieners, ante*, p. 247.

*HOMICIDE — INSANITY — BURDEN OF PROOF
OF INSANITY.*

LOEFFNER v. STATE.

[10 Ohio St. 598; *Laws. Insan.* 832.]

Joseph Loeffner, being indicted for killing Nicholas Horton, set up the plea that he was insane when he committed the act. The evidence of Joseph's insanity was rather thin, but when the case closed, and the judge proceeded to instruct the jury, Joseph's counsel wanted the jury told that it was not for him to prove his client insane, but that the State must prove him sane before he could be convicted. But the court thought this idea very "fresh," and told the jury nothing of the kind. Instead of that, it told them that the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime, and the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rests upon the defense.

And Loeffner was straightway found guilty, sentenced, and hanged.

Every person is presumed to be sane; and if he sets up the defense of insanity as a shield to punishment, he is bound to prove that he is insane. This rule is adhered to in most of the States, and has never been departed from in England. Such a presumption, it is obvious, is necessary for the security of mankind. A man going about the world marrying, dealing, acting as if he was

sane, must be presumed to be sane till he proves the contrary. Nevertheless, in no less than nine States,—to wit: Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, and Tennessee,—it is laid down that if the prisoner introduces any evidence of insanity, the burden is upon the State to prove *beyond a reasonable doubt* that he is sane. *Hopps v. People*, 81 Ill. 885; *Stevens v. State*, 81 Ind. 485; *State v. Crawford*, 11 Kas. 2; *People v. Garbutt*, 17 Mich. 9; *Cunningham v. State*, 56 Miss. 269; *Wright v. People*, 4 Neb. 409; *State v. Bartlett*, 48 N. H. 224; *O'Connell v. People*, 87 N. Y. 830; *Lawless v. State*, 4 Lea, 159.

***HOMICIDE—SELF-DEFENSE—DEFENSE OF
THE PERSON.***

COMMONWEALTH v. SELFRIDGE.

[Horr. & Thomp. Cas. Self-Defense, 1.]

Mr. Selfridge was an elderly Boston lawyer of good practice and standing. Charles Austin was a Harvard student, eighteen years of age, and a son of Benjamin Austin, a political writer and an active Democrat. Mr. Selfridge was a Federalist. A quarrel had arisen between Mr. Selfridge and Mr. Benjamin Austin, which had ended in Mr. Selfridge publishing a card in the newspapers stigmatizing Mr. Austin as a coward, a liar, and a scoundrel. On the next morning (August 5, 1806), as Mr. Selfridge was walking down State Street, Charles Austin advanced towards him with a walking-stick in his hand, with which he gave Mr. Selfridge several blows upon the head. As the first or second blow was descending, Mr. Selfridge fired a pistol at Charles Austin, who expired in a few moments, shot through the body, though he struck several blows after he was shot.

Mr. Selfridge, being put on trial for the killing, pleaded that it was done in self-defense. The evidence adduced there relevant to the case was as follows: "That Young Austin was strong and athletic,

while Mr. Selfridge was delicate and slender; that young Austin had purchased the stick that morning, saying that he wanted one that would stand a lick; that Austin *pere* had said, the morning of the affray, that 'he should not meddle with Selfridge himself, but some person upon a footing should take him in hand;' that Mr. Selfridge had been informed by one of his personal friends that he was to be attacked by a bully hired for the purpose.

Mr. Justice Parker, who presided at the trial, laid down the law as follows: —

1. If a man is attacked by another, under circumstances which indicate an intention to take away his life or do him some great bodily harm, he may lawfully kill his assailant, provided he use all the other means in his power to save his life or prevent the harm, — such as retreating or disabling his adversary.
2. Where the attack is so sudden or violent that a retreat may be more dangerous, he may kill without first retreating.
3. A killing to resist a chastisement, disgraceful but not threatening death or great bodily harm, is not justifiable.
4. Where a person brings on an assault upon himself, he is not justified in killing his assailant in resisting it; but as words do not justify an assault, young Austin's assault was not "brought on" by Selfridge within this rule.
5. Lastly, Mr. Justice Parker told the jury that they must settle in their minds, from all the circumstances of the case, — the suddenness and violence of the attack, the nature of the weapon with which it was made, the place where it happened, the muscular

debility or vigor of the defendant, and his power to resist or fly; whether he could have saved himself from death or great bodily harm by retreating to the wall or throwing himself into the arms of friends who would protect him. This was the real point in the case, and if the defendant could have escaped young Austin's vengeance at the time of the attack, his plea of self-defense failed.

Mr. Selfridge was acquitted; and though on the facts the acquittal was perhaps wrong,—party feeling having entered into the prosecution and defense to an extraordinary degree,—the statement of the law, as given by Mr. Justice Parker, has rendered this one of the leading American cases in the law of self-defense.

Self-Defense is the right which every person has to inflict death or great bodily harm on another, in order to protect himself or some one else from unlawful violence. The question whether or not this right may be lawfully exercised arises in ten cases, viz.: When it is resorted to:—

1. Against death or great bodily harm arising from an attack.
2. Against death or great bodily harm arising in a mutual combat.
3. Against death or great bodily harm arising from the wrongful act of the slayer.
4. Against unlawful arrest.
5. Against common assaults.
6. Against the commission of a felony.
7. Against the defense of other persons.
8. Against the lives of innocent persons.
9. Against attacks on the habitation.
10. Against attacks on other property.

1. *Against death or great bodily harm arising from an attack.* Selfridge's Case illustrates the law on this point. As a person has a right to protect himself against injury, he may resist an attack on himself, and in defense of his life may take life. And even to escape great bodily harm, he may take life if it is necessary to prevent it. But this must be the only way out of the dilemma. As has been well said, the point of honor that retreating shows cowardice, is not regarded by the law, and therefore if a man can avoid the attack by beating a retreat he must do so. In the language of the old authorities, he must "retreat to the wall;" in other words, be driven into a corner before he can kill his opponent. He may stand his ground and resist force to force without retreating; but when it comes to taking human life, which the law regards as very sacred, there must be great necessity to excuse it.

2. *Against death or great bodily harm arising in a mutual combat.* The same rules as in the last case are to be applied to this. It may be mentioned, however, that the later cases seem to require the element of "retreating to the wall" more strongly in this than in the case of an attack, as in Case I.

3. *Against death or great bodily harm arising from the act of the slayer.* As to the law in this case, see *Vaiden v. Com., post*, p. 259.

4. *Against unlawful arrest.* As to the law in this case, see *Noles v. State, post*, p. 262.

5. *Against common assaults.* It seems to be settled that a party in resisting a mere assault is not justified in taking the life of his assailant, and can not plead self-defense for so doing. The defense used in such a case is too disproportionate to the danger for the law to justify it.

6. *Against the commission of a felony.* But a felonious assault is a different matter. The law will justify the taking of life when necessary to prevent the commission of a felony, or (as we have seen) to prevent great bodily harm. When the attack is with a dangerous or deadly weapon, the presumption that a murderous intent is entertained by the aggressor arises, and the party assailed will be justified in resisting to the death. As put by an old writer frequently cited in this connection: "A man may repel force by force in the defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, — such as murder, rape, robbery, arson, burglary, and the like, — upon another. In these cases he is not

obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it is justifiable homicide." 1 East P. C. 271. But if he otherwise—as by arresting him or disabling him—can prevent the threatened felony without killing him, he is bound to do so; and a felony without force—for example, pocketpicking—cannot justify a defense of this kind.

7. *Against the defense of other persons.* As a general rule, whatever a man may lawfully do for himself he may lawfully do for others. Therefore, when a person is attacked by another, it is the right of a bystander to interfere and prevent it if he can, and he has the same right of defense as the party attacked has. The right is even larger in the relation of master and servant, parent and child, and husband and wife, and, in the case of an attack on the habitation, guest and host. The same limitation as before—viz., that the necessity must leave no other alternative but the killing—attaches here, too.

In a Georgia case, Mr. Biggs, who was living at a hotel, had detected a man named Parish making very free with his wife one night. He told him that he would kill him if he did not leave the city before morning. But Parish was not to be bluffed, and instead of leaving he appeared in the breakfast-room next morning, even going so far as to take a seat beside his paramour. When the husband came in he was very mad, and shot Parish. He was convicted, but on appeal to the Supreme Court, that tribunal held the case one of defense of a felony. *Biggs v. State*, 29 Ga. 723; Horr. & Thomp. Cas. Self-Defense, 744. The chief justice, who delivered the opinion, had a good deal to say about "female purity," and the "marriage relation," and "sacked habitations," "destruction of female innocence," and the like. The opinion bristled with heroic sentences. It was magnificent, but it was not law. In the first place, seduction was not a felony; and in the second place, shooting was not the last resort to prevent the man from accomplishing his purpose. Biggs might have locked his wife up, or himself have left the city, taking her with him.

8. *Against the lives of innocent persons.* This is an instance which will seldom arise; it has come before the court in but one reported case. It rests, however, on the ground of necessity—that necessity which "knows no law." Long ago Lord Bacon put the case of two persons being at sea upon a plank large enough to carry but one, and one pushing the other off. Both the great Chancellor and Blackstone were of opinion that this would not be murder, but

self-defense. The reported case to which I have alluded (U. S. v. Holmes, 1 Wall. Jr. 1; Horr. & Thomp. Cas. Self-Defense, 757) reads like one of Marryatt's or James Fenimore Cooper's sea novels. On April 19, 1841, the American ship William Brown, having on board sixty-five passengers and seventeen of a crew, struck an iceberg and foundered in mid-ocean. The captain, second mate, seven of the crew, and one passenger got into the jolly-boat. The first mate, eight seamen (Holmes was one of them), and thirty-two passengers got into the long-boat. The remainder of the passengers went down with the ship. The next morning the boats parted company, the captain telling the crew of the long-boat to obey the orders of the mate, which they promised to do. Six days later the jolly-boat was picked up by a French fishing lugger. But how fared it with the long-boat? You shall hear. Loaded to the water's edge, she could only be kept afloat by constant bailing. A slight blow, a collision with a piece of ice, even a mistake in steering would certainly swamp her. Nor was there even the slightest hope of rowing her to shore, filled as she was with human beings. On Tuesday morning, after the two boats had parted company, it began to rain and continued to rain throughout the next day and night. Towards morning the wind began to freshen, the sea grew heavier, and once or twice a wave swept completely over the boat, wetting every one to the skin. Pieces of ice were floating about, and an iceberg was discovered ahead. About ten o'clock the next night, after the boat had been afloat over twenty-four hours, the crew determined on a terrible remedy—to lighten the boat. Of what? Of the human freight. They commenced to throw over the passengers, and did not stop till there had disappeared under the waves fourteen men and two women of the passengers of the William Brown. No lots were cast, but man and wife were not allowed to be parted. When the dread work had been completed, there remained on the long-boat nine seamen (including the negro cook) two men and sixteen women. Early next morning a sail appeared, but the shock and the exposure had been so great that only one man in the boat was able to see it and to put out a signal, and he was the sailor Holmes. The ship left her course, sent out a boat, and the twenty-seven sufferers were saved. Back again in his own country, Holmes, the seaman, was indicted for the murder of Charles Aiken, one of the passengers thrown overboard. Mr. Justice Baldwin, before whom the case was tried, told the jury that in a case of necessity even the taking of human life was permitted. "The

penal laws," said he, "pass over such a case in silence; for law is made to meet but the ordinary exigencies of life." But the slayer must be under no obligation to make his own safety secondary to the safety of others. And a seaman had this obligation toward passengers. "Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have taken themselves for safety to the small boats; for imminence of danger can not absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to require the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labor or to incur the risk of life, can not be bound to sacrifice his existence to preserve the sailors. The captain, indeed, and a sufficient number of seamen to navigate the boat must be preserved; *for except these abide in the ship all will perish*; but if there be more seamen than enough to manage the boat, the supernumerary sailors have no right, for *their* safety, to sacrifice passengers. The sailors and passengers, in fact, can not be regarded as in equal positions. The sailor, to use the language of a distinguished writer, *owes more benevolence to another than to himself*. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him. This rule may be deemed a harsh one towards the sailor who may thus far have done his duty; but when the danger is so extreme that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?" And even when it is necessary to sacrifice some, the selection must be made by lot, if there is time to resort to this method. The jury found Holmes guilty of manslaughter, but with a recommendation to mercy; and he was sentenced to a short imprisonment and fine, the latter being subsequently remitted by the President.

9. *Against attacks on the habitation.* A man's house is his castle, and as much now, perhaps, as in olden time, when men really lived in castles and had a crowd of retainers around them, the drawbridge up, and the moat filled with water, one may resist to the utmost an attack upon his habitation. If the attack is for the purpose of committing a felony there, and he feels that the forcible

entry can be resisted in no other way, he may kill the intruder. And there is this difference between a man being in his house and out of it when attacked,—in the latter case, we have seen he is required to "retreat to the wall;" but in the former he is not obliged to retreat—his house is the "wall" for this purpose.

10. *Against attacks on other property.* This being a mere trespass, is subject to the same rule as a common assault on the person,—the necessity alone does not justify a killing.

HOMICIDE—SELF-DEFENSE -- NECESSITY PRODUCED BY SLAYER.

VAIDEN v. COMMONWEALTH.

[12 Gratt. 717; Horr. & Thomp. Cas. Self-Defense, 222.]

The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them, growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no "fuss" to which he assented, said good-night and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and started for the door, but was induced by his wife not to go out. Guns were evidently used instead of walking sticks in that neighborhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden.

The deceased then walked away, accompanied by two other persons, and by a son of Vaiden's who went with the party as far as the fence to let them through the draw-bars. As they stood at the fence talking Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of his gun by the barrel as if to use it as a club and rushed at Vaiden. The latter called out that if he did not stop he would shoot him. The warning went unheeded,

and when the deceased got within a few feet of him, Vaiden falling back a few steps fired. The deceased then struck Vaiden two blows with the breach of his gun and staggered back, mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense. But the court held that he being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted.

The prisoner must be without fault in bringing upon himself the necessity for killing another. "It will not do," said one judge, "to say that a party may commence an affray and when he is about to suffer the penalty of his temerity, may take the life of his adversary to avert the danger that threatens him." Stoncifer's Case, 6 Cal. 407. This principle has been said to be a kind of estoppel in analogy to the maxim of the civil law — "No man shall take advantage of his own wrong."

The doing of the following acts, it is said in a learned work on this subject (Horr. & Thomp. Cas. Self-Defense, 226), has been held so far to abridge a man's right of defense that if he thereupon kill another, he cannot be acquitted of the crime, viz.:

- (a.) Commencing an assault, attack, or battery upon another.
- (b.) Attacking another with a deadly weapon.
- (c.) Going to the place where the slain person is, with a deadly weapon, with the purpose of provoking a difficulty or with the intent of having an affray.
- (d.) Using provoking language or resorting to any other device in order to get another to commence an assault, so as to pave a pretext for taking life.
- (e.) Agreeing with another to fight him with deadly weapons. This is the case, for example, of a duel.
- (f.) Other cases of wrong doing. An Iowa case presents an instance of this kind. A saloon-keeper sold a man liquor by the glass until he was very drunk. He left the saloon in this condition, but late at night forced his way in again and endeavored to provoke a

fight with the saloon-keeper, and made an assault on him without a weapon. The saloon-keeper thereupon shot and killed him, and on his trial urged that the killing was done in self-defense. But Dillon, J., said: "The conduct of the deceased was highly blameworthy. He it was that provoked the difficulty instigated, doubtless, by the liquor which he drank and to which he became a victim. The only mitigation which his conduct finds, if it finds it at all, is in the fact that he was intoxicated and in part by liquor sold to him by the defendant. It will not do to hold that a saloon-keeper may sell a man that which steals away his senses and clouds his reason, and then himself being in no serious danger, shoot him dead, because he is unreasonable, insulting and quarrelsome." *State v. Decklotts*, 19 Ia. 446.

As to the crime which the slayer commits: —

1. If he provoked the combat or produced the occasion in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be *murder*, no matter to what extremity he may have been reduced in the combat.
2. If he provoked the combat or produced the occasion, intending only an ordinary battery, the final killing will be *manslaughter*.

*HOMICIDE — SELF-DEFENSE — UNLAWFUL
ARREST.*

NOLES v. STATE.

[26 Ala. 31; Horr. & Thomp. Cas. Self-Defense, 697.]

Mrs. Noles, having made a complaint against her husband to a justice of the peace, the latter, without issuing any legal warrant, told Sharp, a constable, to arrest Noles. Sharp summoned a posse of seven or eight men and started for Noles' house. As they approached, Noles came into the yard with a gun in his hand and ordered them off; remarking that if they abused him he would shoot some of them; that they were a drunken, rowdy set, and that if they would go away and send some old man or some ten-year-old boy he would go with him. The party at this halted, and Sharp told Noles not to shoot, that they would come back in the evening and arrest him. Noles replied that he would be at home then.

In the evening, Sharp having increased his forces, and having armed himself with a shot-gun, made an-

other expedition to the Noles' mansion. Again, the proprietor came out into the yard with his arms, and told them that if they advanced he would shoot some of them. Again the party halted, and Sharp dismounted. He had no sooner reached the ground than Noles fired, killing the constable.

Noles was tried and convicted of murder. "We admit," said the court, "the right of any citizen to resist any attempt to put any illegal restraint upon his liberty. But his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind any reasonable belief of such danger."

A non-felonious assault does not justify the taking of a life in its resistance, nor does an unlawful arrest, and for a similar reason. In neither case is the injury irreparable (as is the case of felony on the person), for an illegal arrest can be remedied by a writ of *habeas corpus*, and an action for damages, and a simple assault does no permanent harm.

An unlawful arrest is a trespass merely, and not a felony, nevertheless a person is not obliged to submit to an unlawful arrest; he may resist, repelling force by force, but this resistance must not be disproportionate to the injury threatened.

And though the attempted arrest be lawful, the party must have notice of the official character of the officer; else he may resist as in a case of an unlawful arrest. In New York a man was pursued one night by a shouting mob, threatening his life, and while endeavoring to escape under a well-founded apprehension of great bodily harm, if he were taken, he was seized by a person whom he instantly killed. This person turned out to be an officer with authority to arrest him. Yet it was held that in order to make him guilty, the prosecution would have to prove that the man had knowledge of the official character of the deceased. *Yates v. People*, 32 N. Y. 509.

There is one case of unlawful arrest where the person may resist to the death, *i.e.*, an attempted arrest without any show or color of lawful authority, as kidnapping, or taking a person by a vigilance committee.

HOMICIDE — MANSLAUGHTER — PROVOCATION.

REG. v. STEDMAN.

[Fost. 292.]

Nearly three hundred years ago, there was a fight on the street of an English town. A soldier named Stedman who was passing, seeing the encounter ran up to stop them. A woman standing by a door called out, "You will not murder the man will you?" The soldier, in language more forcible than polite, replied, "What is that to you, you bitch." The woman replied by a box on the ear, and the soldier pulled his sword and struck her in the breast with its handle. Then she turned round and ran, but the soldier pursued her, and put his sword through her back. This finished the woman, and the soldier was indicted for her murder.

Lord Holt thought at first that this was a case of murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner after he had given her a blow in return, but it afterwards appearing in the progress of the trial, that the woman *struck the soldier in the face with an iron patten*, which drew a great deal of blood, it was holden clearly to be no more than manslaughter. "The smart of the man's wound and the effusion of blood might

possibly keep his indignation boiling to the moment of the fact."

Manslaughter is the unlawful killing of another without malice aforethought. It is of two kinds, *voluntary* and *involuntary*.

I. *Voluntary manslaughter* is when the act is done with a design to kill, but under such circumstances of provocation that the law, in its tenderness for human infirmity, regards them as palliating the crime, and will not convict the actor of murder.

This defense, as has been said, is permitted, "not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing, of an intent to commit it, but because it presumes that passion disturbed the sway of reason and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect and, therefore, not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefor as an infirm human being. We nowhere find that the passion which, in law, rebuts the imputation of malice, must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the brief and furious anger renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable of human infirmity." *State v. Hill*, 4 Dev. & B. 491. The Soldier's Case above is one of the leading as well as one of the oldest authorities upholding this principle.

II. *Involuntary manslaughter* is where one causes the death of another without intending it. *Post*, p. 269. This, as we will see further, may be entirely accidental, and is then not punishable at all. *Post*, p. 272.

What acts, then, it is necessary to inquire, constitute sufficient provocation to reduce an intentional killing from murder to manslaughter? They are the following, falling under four divisions: —

1. *An assault or battery inflicting great bodily harm or great insult.* This was the Soldier's Case. Stephen gives this example: A. pulls B. by the nose. A. has given B. provocation within this rule.

2. *A sudden quarrel.* A. and B., armed with swords, quarrel, draw their swords, and fight. Each has given the other provoca-

tion, and if one is killed the offense of the survivor is reduced to manslaughter.

3. *An unlawful imprisonment or arrest.* A. attempts to arrest B. on an irregular warrant and in an irregular way. B. shoots A. dead. This is only manslaughter, by reason of the provocation given by A. to B.

4. *Adultery in the wife.* The *sight* of the act of adultery committed with the wife is a provocation to the husband to kill either her or the adulterer, or both. But *sight* is the gist of this exception. The rule is laid down in the leading case thus: If a man kill his wife or the adulterer in the act of adultery it is manslaughter, *provided the husband has ocular inspection of the act.* Pearson's Case, 2 Lew. 216. The law extends this provocation no further, though juries (especially in Kentucky) sometimes on the ground of provocation (by doing violence to their oaths for a matter of sentiment), acquit a husband for the murder of a person whom he has only suspected of adultery with his wife. But this is not and never can be law. "When a husband," said Ruffin, C. J., in a leading case on this point, "only hears of the adultery of his wife, no matter how well authenticated the information may be, or how much credence he may give the informer, and kill either the wife or her paramour, he does it not upon present provocation, but for a past wrong, a grievous one, indeed; but it is evident he kills for revenge. Let it be considered how it would be if the law were otherwise. How remote or recent must the offense be? How long or how far may the husband pursue the offender. If it happen that he be the deluded victim of an Iago, and after all, that he has a chaste wife, how is it to be then? These inquiries suggest the impossibility of acting on any rule but that of the common law without danger of imbruining men's hands in innocent blood, and certainly of encouraging proud, heady men to slay others for vengeance instead of bringing them to trial and punishment by law." State *v.* Neville, 6 Jones (L.), 483. And this provocation can only be given to the husband,—a brother, father, or a lover is not within the rule. Nor has it ever been decided that fornication in a husband is a provocation to the wife.

On the other hand neither words, nor gestures, nor injuries to property, nor breaches of contract amount to provocation within this rule.

It should be noted that provocation and self-defense are widely different—in the latter the ground for the blow is the neces-

sity to take such a step for self-preservation; in the former this necessity is not present, but a heat of the blood, an anger, an absence of calm reason, puts the party in a position where he is unable to control his actions for the moment—in the latter, the act is excused entirely, in the former the punishment is only reduced.

But though there be legal provocation, yet if the prisoner did not act under it, but under a previously formed malice, he is guilty of murder. *State v. Johnson*, 1 Ired. (L.) 354.

*HOMICIDE — NEGLIGENCE — MISADVENTURE.***REX v. HULL. REX v. RAMPTON.**

[Kelyng, 40; 1 Ld. Cr. Cas. 50.]

Now in the chronicles of Kelyng, which were written in the fourteenth year of the reign of the merry King Charles II., it is written :—

“ In the Sessions in the old Bailey, holden the 13th of January, 1664, one John Hull was indicted for the Murder of Henry Cambridge, and upon the Evidence, the Case was that there were several Workmen about, building of a House by the Horse-ferry, which House stood about 30 foot from any Highway or Common Passage; and Hull being a Master-workman (about Evening when the Master-workmen had given over work, and when the Laborers were putting up their Tools) was sent by his Master to bring from the House a piece of Timber which lay two Stories high; and he went up for that piece of Timber and before he threw it down, he cried out aloud, Stand Clear, and was heard by the Laborers and all of them went from the Danger, but only Cambridge and the Piece of Timber fell upon

Several workmen build a house by ye horse-ferry.

Hull mounteth to ye roof for a piece of ye timber.

He getteth ye timber.

He crieth out, "Stand clear."

And pitcheth it on ye head of Cambridge.

Who dieth. him and killed him; and my Lord Chief
Per Ld. Hyde, Justice Hyde held this to be Manslaughter,
Hull hath com- mitted man- slaughter. for he said he should have let it down by a

Rope, or else at his peril, be sure No body is
there. But my brother Wylde and myself

But per Kel- vng & Wylde, J.J., it is only manslaughter. held it to be Misadventure, he doing noth-

ing but what it is usual with Workmen to do;
and before he did it crying out aloud, Stand
Clear, and so gave notice if there were any
near they might avoid it; and we put the
Case, a Man lopping a Tree, and when the
Arms of the Tree were ready to fall, calls out
to them below, Take Heed, and then the Arms
of the Tree fall and kill a Man, this is Mis-
adventure, and we showed him Poulton *de
pace*, 120, where the Case is put and the
Book cited and held to be Misadventure;
and we said this Case in Question is much
stronger than the Case where one throws a
Stone or shoots an Arrow over a Wall or
House, with which one is slain; this in Kello-
way, 108 and 136, is said to be Misadven-
ture.

London streets
and country
towns much
differ.

But we did all hold that there was a
great difference 'twixt the Case in Question,
the House from which the Timber was thrown
standing thirty foot from the Highway or
Common Footpath, and doing the same act
in the Streets of London; for we all agreed
that in London that if one be a Cleansing of
a Gutter, call out to Stand Aside and then
throw down Rubbish or a piece of Timber, by
which a Man is killed, this is Manslaughter;
being in London, there is a continual Con-

course of People passing up and down the Streets and a new Passenger, who did not hear him call out, and, therefore, the casting down any such from a House into the Streets is like the Case where a Man shoots an Arrow or Gun into a Market-place full of People, if any one be killed, it is Manslaughter; because in common Presumption, his Intention was to do Mischief when he casts or shoots anything which may kill among a Multitude of People; but in case that an House standing in a Country Town where there is no such frequency of Passengers, if a Man call out thereto Stand Aside, and Take Heed, and then cast down the Filth of a Gutter, etc., my Brother Wylde and I held that a far differing case from doing the same thing in London. And because my Lord Hyde differed in the Principal Case, it was found Specially; but I ^{Judgment for} _{Hull.} take the Law to be clear that it is but Misadventure.

“At the same Sessions, James Rampton was indicted for the Murder of his Wife, and upon the Evidence, the Case was that he being a Hackney Coachman found a Soldier’s ^{Rampton find-} _{eth a pistol.} Pistol in the Street, and when he came home he showed it to his Master, and they took ^{He and his} _{master seek} ^{ye bullets.} the Gunstick and put it into the Pistol and it went down into the Muzzle of the Pistol, by which they thought it was not Charged, and his wife standing before him he pulled up ^{Mistress} _{Rampton} ^{looketh in.} the Cock and the Pistol went off, and being

And getteth charged with two Bullets wounded her in two bullets in the Belly, and killed her, upon which he cried out, 'O, I have killed my dear Wife,' and called in Neighbors, It was holden by Verdict of us all that this was Manslaughter and not manslaughter. Misadventure.'

As we have already seen, an act to be criminal must be intentionally so, *ante*, p. 48, (except where it is positively prohibited by statute, *ante*, p.50). But we have also seen that this intent may be, and often is, inferred from the act itself. *Ante*, p. 49. As every one is presumed to intend the natural and ordinary consequences of his acts, if he is guilty of such a degree of negligence as naturally leads to certain results, he is presumed to have intended that result, and if it is fatal, to have intended a fatal result. And he is as criminally responsible as though his conduct proceeded from a malicious motive, though not, of course, in the same degree.

The law seeks to protect a person's life as well from negligence as from malice. In one case in England, the prisoner was an iron founder employed to cast some cannon. One of them on being fired burst, and was sent back to be recast. Instead of recasting it he filled up the hole with lead and returned it. As was to be expected, the first time it was used it exploded, and this time killed a man. The founder was held guilty of manslaughter. *Reg. v. Carr*, 8 C. & P. 168. The case of the sportive young man who thought the pistol was not loaded when he snapped it at a young lady is a similar one. *Ante*, p. 59.

From the authorities on the subject, four rules may be evolved:—

1. A man is not criminally responsible for an accident.
2. A man is criminally responsible for negligence.
3. Negligence may be by omission as well as commission.
4. Negligence, when it comes to crime, is not excused by negligence in the other party.

The third of these have been already discussed, *ante*, p. 39, and the fourth division is treated, further on, in *Reg. v. Longbottom*, *post*, p. 274. The first two require a few more remarks.

1. A man is not criminally responsible for an accident. Neither criminally nor civilly (see 1 Laws. Ld. Cas. Simp., p. 215), does the

law punish one who is the unwilling and unintentional cause of an accident. But in common parlance "accident" is a very wide term; much wider than in the law. A railroad train plunges through a defective bridge, or runs through an open switch; the next day the newspapers are full of the last railroad accident, as they call it. But in nine cases out of ten it is nothing of the kind—it is negligent, not accidental, as the railroad finds when the demands for injuries begin to come in or are settled at the end of a lawsuit.

But it is not a crime to cause death or bodily harm accidentally, by an act which is not unlawful. It is an accident, for instance, where a schoolmaster punishes a child in a moderate manner, and the child dies from the effects of the thrashing. It is an accident where in turning a man out of your house, using no more force than is necessary, the man stumbles, strikes his head against a stone and is killed. It is an accident where a person throws a piece of wood into his yard, which is carried by an extraordinary gust of wind into the street where it hits a pedestrian and kills him.

It is not, however, as the cases in Kelyng show, where there is negligence or where a fatal result is likely to result from the act done. Nor is it an accident where the thing done is unlawful. A schoolmaster gives a child an immoderate beating (which is unlawful) and the child dies; this is not an accident.

2. *A man is criminally responsible for negligence.* The cases from Kelyng, and the remarks at the beginning of this note, illustrate this rule.

***HOMICIDE — NEGLIGENCE — CONTRIBUTORY
NEGLIGENCE NO DEFENSE.***

REG. v. LONGBOTTOM.

[3 Cox, 439; 1 Lead. Cr. Cas. 66].

THE MISTAKES OF LONGBOTTOM AND TRUEMAN.

A DRAMA IN ONE ACT.

DRAMATIS PERSONÆ.

RALPH LONGBOTTOM	A TAILOR
REUBEN READY, Longbottom's Friend	A SHOEMAKER
JOHN TRUEMAN	AN OLD MAN, VERY FEEBLE AND DEAF
DAVID KEANE	A LAWYER
PARK	A BARON OF THE COURT OF EXCHEQUER
HODGE	A LABORER
PODGE	ANOTHER LABORER

[Time, 1849. Scene I.—A shop in the town of Ipswich. Scene II. and III.—The road between Ipswich and Bentley. Scene IV.—The Court of Assizes at Bury St. Edmunds].

SCENE I.

[A Shop in the Town of Ipswich; over the door is the sign "Ralph Longbottom, Tailor." As the curtain rises, Longbottom is discovered stretching his arms and gaping].

Longbottom (log.). What a lovely day. What a day to be outside, instead of sitting cooped up here

with no company but a hot iron and a yard stick. If I only had some one to go with me, I think I would shut up shop and go fishing; for really I have nothing to do; no business; no nothing.

[Enter READY.

Ready. Hello, Ralph!

Longbottom. Hello yourself. What are you doing with that whip?

Ready. I am going for a drive as far as Bentley. Come with me, can't you.

Longbottom. The very man I have been wishing to see; of course I'll go.

[Exit.

SCENE II.

[The road between Ipswich and Bentley].

Enter *Trueman* (*log.*). They thought they had got the old man fastened up. Ha! Ha! But they forgot the back door. He! He! Polly says to me this morning: "You know, grandpa, that it is dangerous for you to go walking in the road; you are so feeble that you might be run over by a team before you could get out of the way." Can't get out of the way, indeed! I'd have you know that the old man is not as bad as that yet. And Mary says: "Grandpa," says she, "if you were not so deaf it wouldn't be so bad, but you know you can't hear anything." Why can't they let me alone? I fancy I am old enough to take care of myself; and I am going for a stroll now for all those pesky children. But my feet are sore, and I must walk in the middle of the road where it is softest. I'll hear the horses coming, never fear.

[Exit TRUEMAN.

SCENE III.

[Another part of the same road. Enter LONGBOTTOM and READY in a buggy].

Longbottom. I wish we hadn't stopped so long at *The Mitre*, Reuben. You've had two horns too many. You can't drive steadily. You want to go fast? Well, give me the reins and I'll make the old nag go. (READY gives him the reins.) So long, hurrah, now ain't we flying. People had better keep out of our way, and wagons, too, if they don't want to lose a wheel. Hip, hip, g'lang. Here's two-forty on a nice road. Now they had better look out, for I can't; g'lang. Hello! what's that; ran over a man? I believe we did. More men ahead, and they tell us to stop. What's the matter?

[LONGBOTTOM draws up; enter HODGE.

Hodge. What do you mean by driving at that rate. You ran over a man just now, you drunken fools. You deserve to go to prison, and you will, I bet, if you have killed him. Who is it Podge; is he dead?

[Enter PODGE.

Podge. His neck is broken; it is old John Trueman.

SCENE III.

[A Court Room in the town of Bury St. Edmunds. The Assizes in Session.]

Baron Park. Ralph Longbottom and Reuben Ready you are charged with killing John Trueman by driving over him in a buggy. Podge and Hodge have testified that you were driving at a very high speed, towards dusk, and in a very reckless manner. What have you to say?

Keane. If your lordship please, I appear for the prisoners. I submit that they ought to be acquitted, as it appears that the deceased contributed, in a great measure, if not altogether, to his own death, by his own obstinacy and negligence. He was an old and very deaf man, who had an inveterate habit of walking at all hours in the middle of the road. Against the probable consequence of an indulgence in this habit he had been often warned, but without effect. The darkness, at the time, and his infirmity ought to have induced him to refrain from the selection of the most frequented part of the high road. No accident could have happened if the deceased had been on the side of the road where foot passengers always walk. He had, therefore, contributed to his own death; his relations could not, for this reason, bring an action for damages against the prisoners for negligence, and does not the same reasons exonerate the prisoners from a charge like the present?

Baron Park. No. There is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence, and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence amounting to illegality; and there is no balance of blame in charges of felony, but whenever it appears that death has been occasioned by the illegal act of another that other is guilty of manslaughter in point of law. Your clients will have to be punished for their crime.

[CURTAIN FALLS].

It is a most familiar principle of the common law that where an injury is produced by negligence, the injured party has no remedy

against the other if his own negligence contributed to the result. A careless man is not allowed to complain of another no worse than himself. See Vol. I. Laws. Lead. Cas. Simp. 233. Long-bottom's case is important as showing that this rule does not obtain in the criminal law.

CHAPTER V.

OFFENSES AGAINST THE PROPERTY OF INDIVIDUALS.

ARSON—“DWELLING HOUSE.”

STATE v. McGOWAN.

[20 Conn. 245.]

Mr. Warner, having succeeded in possessing himself of a moderate share of this world's goods, concluded to build himself a home. He engaged an architect, and after numerous consultations and changes of plans, followed by many broken promises on the part of the contractors, the house one October evening was nearly finished. All that was to do was to paint it, and to put in the glass above the front door. Mr. Warner was destined never to occupy it, for on the night of which I speak, a workman who had been discharged for drunkenness and incapacity took his revenge by building a bonfire in the cellar, which burned the house to the ground.

The workman was arrested and tried for arson. But the court decided that he was not guilty of this offense, because the house was not a dwelling-house, in such a sense that to burn it was arson. “In shape and purpose,” said Chief Justice Church, “it was a dwelling-

house — but not in fact ; because it had never been dwelt in ; it had never been used, and was not contemplated as then ready for the habitation of man. *Arson*, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning, because it manifested in the perpetrator, a greater recklessness and contempt of human life than the burning of any other building, and in which no human being was presumed to be."

Arson at common law is the malicious burning of another man's house, intending at the time to do so. It was a very serious offense; for the law regarded it as an extremely grave matter to violate the safety or the sanctity of a person's abode in this manner. From the definition just given it will be seen that there are four elements in the crime.

1. *It must be malicious.* To carelessly drop a match or throw a spark in a man's residence which results in a conflagration is not arson.

2. *It must be the dwelling-house of another.* Being an offense against the security of the habitation, the subject of the crime must have been, at common law, a "dwelling"—i.e., a place where somebody lived. This word, however, includes all outhouses and structures so near the house as to be in danger of taking fire from them if a fire should be started there. It seems that somebody should live there, for if a house be standing uninhabited and alone it is not arson to set it on fire; yet a house may be occupied although no person is in it at the time. In a Georgia case the court said: "Where a man or a man and his family, or a woman, or a woman and her family are living in a dwelling-house and have their household effects or valuable articles in such dwelling-house, and are temporarily absent at church or on a visit to a neighbor or on business, and the dwelling-house is burnt during such temporary absence, it is the burning of an occupied dwelling-house under the meaning of the statute, although no one was in the dwelling-house at the time it was burnt. The object of this statute is to protect the home of the occupants of a dwelling-house and their property therein from the torch of the incendiary, and it is none the less their home, their dwelling-house, because temporarily absent therefrom" *Johnson v. State*, 48 Ga. 116.

The "home of another" is not a house owned by another, but one occupied by another. Therefore the owner of a building living there, or a tenant, does not commit arson in setting fire to it; but the owner does if another occupies it at the time.

By statute in many of the States it has been made arson to set fire to a store, warehouse, or other building, or a ship, as much as a "dwelling-house."

The house must be burned. But it is not even necessary that there should be a flame. The least burning fills the bill. It is enough that the wood is simply charred (*State v. Sandy*, 3 Ired. (L.) 574); or that only a portion of a door is burned, as in the case of the North Carolina convict. *State v. Mitchell, post.* Mr. John Haggerty of San Francisco in order to destroy an enemy's house set fire to some rags on the floor on which he had poured a good deal of kerosene. There was more smoke than fire, in consequence of which the thing was discovered, but not before much harm was done. A little spot on the floor was blackened; some of the witnesses thought the fibres of the wood burned; others thought it only smoked. Mr. John Haggerty urged that if he was guilty of anything it was only of an attempt to commit arson, as there had been no burning to speak of. But the court held that there had been enough to make him guilty of arson. *People v. Haggerty*, 46 Cal. 854.

4. *The burning must be intentional.* In other words, when the party does the act which causes the fire he must intend to burn the house. It is not sufficient (as it is in some other crimes) that the crime shall have been the result of some other crime. The ship *Zeminder* was lying at an Irish port laden with rum, sugar, and cotton. There is a tradition that sailors have a weakness for the first two articles of her cargo, and so it is not strange to hear that Seaman Faulkner, in the dead of night, might have been seen stealthily boring into one of the barrels of rum with a gimlet. When he had got enough he tried to stop up the hole, and was obliged to light a match to do so. The rum caught fire and the ship was destroyed. That so great a loss should come in this way was enough provocation to the owner to have the sailor indicted for arson. But the court held him not guilty. He had intended to steal the rum it was true; but he had not intended to set the ship on fire — that was an unintentional accident.

Another case, somewhat similar, arose on this side of the water. A prisoner in a North Carolina jail set fire to his door in order to burn off the lock and give him a chance to get free. The guards,

however, discovered him before the fire had quite consumed the door, and he was subsequently indicted for arson in burning the jail. But the court held that if his intent in building the fire under the lock was not to destroy the jail, but simply to effect his escape, he was not guilty of arson. *State v. Mitchell*, 5 Ired.(L.) 850.

But if a man intending to set fire to the house of A., accidentally sets fire to the house of B., the crime is complete — for he has intended arson all the time.

BURGLARY — WHAT CONSTITUTES "BREAKING."**COMMONWEALTH v. STEPHENSON.**

[8 Pick. 855.]

'Squire Brown, on retiring for the night, fastened his front door by turning a button down upon the latch. He closed all the windows except the pantry window, which he left open, but which had a screen of twine over it, to keep the cats and rats out. When 'Squire Brown came down the next morning he found this screen torn off, the front door open, and some of his best silver missing. Mr. Burglar had evidently come in at the window and gone out at the door.

'Squire Brown was not a man to be robbed, if he could help it; he employed detectives, who succeeded in catching the man who had come in at the window and gone out at the door with the 'Squire's silver. The proof was very clear and the man was convicted of burglary.

Successful burglars are able to employ capable counsel; this man had two, who argued for him in the Supreme Court that there had been no "breaking" proved — and "breaking" is an essential element of the crime of burglary. "Entering an open window," said they, "is not a 'breaking' which will sustain a charge of burglary. The circumstance that a

netting was stretched across the window in this case is immaterial, as this netting was put up only as a security against the entry of small animals. To constitute a breaking the thing broken must be a part of the house."

But the court decided against them and the man had to go to prison. "The question in this case," said Parker, C. J., "is whether there was a breaking or not. The lifting of a latch and opening the door, though not bolted or locked, the shoving up a window though not fastened, the getting down a chimney and various other acts done to affect an entry, are held to be a 'breaking.' The offense consists in violating the common security of a dwelling-house, in the night time, for the purpose of committing a felony. It makes no difference whether the door is barred and bolted or the window secured or not; it is enough that the house is secured in the ordinary way, so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter. Shutting the window blinds and leaving the windows open for air is a common mode of closing the house in the warm season; if the blinds are forced, it is a breaking. The objection is that the lattice work of the dairy window was of twine only. Suppose it were of wire or of thin slats of wood, would there be any difference? This network was nailed down on all sides; it was torn away by the defendant, and he entered the breach. This is quite sufficient to constitute a burglarious breaking and entry."

The enterprising burglar in the intervals of his trade is accustomed, according to the authority of Messrs. Gilbert and Sullivan, to linger in the woods by the side of a rural stream, listening to the

babbling of the gentle brook, and the music of the village chime. I recommend him in this pleasant vacation to take my book with him, and especially to read with care and attention, the cases and notes on my present topic. Seeing, as he will see, the sad fate of many of his predecessors in his line of business, and the very wide definitions which are given by the courts to the essential words (such as "breaking" and "entering") of the definition of the crime of burglary, he will probably be struck with fear at the fate which awaits him, should he continue his present calling. Then he may make up his mind to reform, to throw away his tools, his mask, his picklock, his pistol, and his dark lantern, and to become a respectable citizen and a good man. To attain this eminence, it is perhaps needless to say, he will at once prepare to become a lawyer.

Burglary is the breaking and entering the mansion-house of another in the night time with intent to commit some felony there. "This definition," it is said in an early American case (*State v. Wilson, Coxe*, 439; 1 Am. Dec. 216) "is an accurate one, and should be carefully kept in mind, for almost every word of it is significant and important. Before any man can be legally convicted of this crime these five circumstances must be proved. 1. There must be what the law calls a breaking. 2. There must be an entry. 3. The breaking, entry, or one of them, must be in the night. 4. It must be done in a mansion-house. 5. It must be done to the intent of committing some felony therein."

1. *Breaking a requisite to the crime.* To constitute a "breaking" some violence is as a rule necessary; but very little will suffice. If one unlatches a door, opens a window when fastened or raises it when shut and not fastened, pulls back a lock or bolt, picks a lock, takes a pane of glass out of a window or loosens any fastening to doors or windows, this is a "breaking" within the law. In a leading English case a man got into a house by pushing up a cellar door which was kept in its place simply by its own weight. It was held that this was a "breaking." *R. v. Russell*, 1 Moody, 877; 2 Lead. Cr. Cas. 44. In a more recent American case, a fellow succeeded in making his way into a house in Cincinnati by climbing through a transom over the front door—the latter being locked but the transom unfastened. This was held a breaking. "It is plainly the law," said the court, "that where no force is used, as in entering through an open door or window, there is no breaking, and hence only a trespass. On the other hand, where only slight force is used,

as where a glass door or a window is closed down, and kept in place only by its own weight, the force that is necessary to vertically raise it so as to affect an entrance is sufficient to constitute a burglarious breaking. There may exist an appreciable difference between the force that would be required to naturally raise a window that was closed and held down by its weight and that which would be required to push open a closed but unfastened transom that swings horizontally on hinges, as in the case before us; and admitting there is such a difference, the question is whether the force required to accomplish the latter is sufficient to constitute a burglarious breaking? We think an affirmative answer may safely be given. The application of the law does not depend upon the degree of the force used but upon the fact that force of *some* degree, however slight, was used. The force required to push open the transom was undoubtedly slight, but still it must have been an appreciable force, sufficient to overcome the friction of the hinges occasioned by the weight of the transom, and this, under the circumstances, is all that the law requires." *Timmons v. State*, 34 Ohio St. 426 (1878).

On the other hand if a man leave his windows or his doors open, the robber is impliedly invited to walk in, and is not guilty of burglary if he accept the invitation. People must not be careless, and then ask the aid of the law to punish what their own negligence has produced. An Englishman had a hole in the roof of his house to let in light and air—the hole had no glass in nor any net over it (as in Stephenson's case, *ante*). A midnight prowler made a descent into the house *via* the hole and carried off some things which were lying around. "If a man" said the judge who afterwards tried the prowler for burglary, "chooses to leave an opening in the wall or roof of the house instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking." *R. v. Spriggs*, 1 Mood. & R. 357. As an American judge put it in another case: "Leaving a door or window open shows such negligence and want of proper care as to forfeit all claim to the peculiar protection extended to dwelling-houses. But if the door or windows be shut, it is not necessary to resort to locks, bolts or nails; because a latch to the door and the weight to the window may well be relied on as a sufficient security." *State v. Boon*, 18 Ired. (L.) 246.

And the door or window need not be swung wide or high, the invitation is just as good where it is but partly open. "In *Com. v.*

Steward, 7 Dana Abr. 186, it was held that if a window 'be a little pushed up' it is not a breaking to obtain entrance by lifting it higher. The English authorities are to the same effect. Thus in *Reg. v. Hyams*, 7 C. & P. 441, it was held not to be a breaking where the prisoner threw up a sash which had been raised a couple of inches and so effected an entrance, and in 1827 it was held by the twelve judges of England in *Rex v. Smith*, 1 Moody, 178, that there was no decision under which in case of a sash partly open, but not sufficiently open to admit a person, the raising of it so as to admit a person could be considered a breaking, and that in this respect the court ought not to go beyond decided cases." *Com. v. Strupney*, 105 Mass. 588 (1870).

But though the outer door be open, and the robber goes through there without using any violence, yet if he, in order to get into any room in the house, has to open or force in an inner door or window, this is a "breaking." *State v. Scripture*, 42 N. H. 485.

Such entrances, however, which it is not the common custom to secure, a man may not pass through, even without using force, without being chargeable with a "breaking." Just the noise one would expect to hear in a haunted house, Mr. Tucker heard one night in his. It seemed to come from the inside of the wall near the chimney. Mr. Tucker looked up the chimney and beheld a man stuck there fast. Assistance was called, but it was of no use, the man in the chimney could not be pulled out, either at the top of the chimney on the roof or at the fire-place below in the room, and the chimney had to be pulled down to extricate him. During the taking down of the chimney the man had plenty of time to confess that he was coming down the chimney to steal when his own width and its narrowness interrupted his journey. "A chimney," said the court which sat on his case, "is a necessary opening that needs protection. It is a part of the dwelling-house, and as much closed as the nature of things will admit. Hence, getting into a chimney of a house with intent to steal is a sufficient breaking and entering to constitute burglary, though the party does not enter any rooms of the house." *Donohoe v. State*, 36 Ala. 271. It is not customary or deemed necessary at the present time to stop up one's key-hole. Now, suppose one of that wonderful tribe of Genii who once flourished in the City of Bagdad, was to emigrate to America, bringing with him all of those obsolete accomplishments of Genii, such as disappearing at will, traveling a thousand miles a second on a carpet, and reducing one's self now to the size of a

needle, and again expanding to the stature of a giant (*vide Arabian Nights' Entertainments*). And suppose he was to turn burglar and come into my house through the key-hole of my front door. I would have him tight; he could not plead that he had broken nothing in getting in. I should cite the tribunal before which I would bring him the case of Donohoe stuck in the Alabama chimney. And the court would straightway send the Genii to jail. But of course my zeal would be ineffectual, as he would be able at his will to wiggle out of his cell by the same route he came into my house.

All these are called *actual breakings*. There is also known to the law what are called *constructive breakings*, of which the case of *Ducher v. State, post*, p. 291, is an illustration.

2. *Entering also requisite.* The least degree of entry into the house with any part of the body or with any instrument held in the hand will suffice; for example stepping over the threshold, putting a finger or hook in at the open window in order to extract the goods. But it must be an instrument used for effecting the second purpose, *i.e.*, the robbery; for if the instrument used merely to effect the breaking, should in that act penetrate through the door or window so as to project within that would not be an entry. *Harris Cr. L.* 209.

3. *The breaking and entering must be at night.* "A man's house," as was said in an early case "is his castle; its security must not be lightly invaded; and to preserve this security and this sanctity, the law has created safeguards, and imposes severe penalties upon their infringement. This is particularly the case in the night, a season appointed for rest, when a man is usually incapable of making any defense, and where assistance is frequently remote and contingent." *State v. Wilson, ante.* At common law night was held to be the period during which a person's face could not be discerned by the light of the sun. Now by statute in England night begins at nine and ends at six. In Massachusetts it is from one hour after sunset to one hour before sunrise, and other States have fixed similar limits by statute.

Both the breaking and the entering must take place at night. If either be in the day time it is not burglary at common law. But the breaking may take place on one night, and the entering on another.

Mr. Green on waking up one morning after daylight, but before sunrise, discovered that his watch was gone, and that the window of his room was open. Looking out he saw that a dry goods box and chair had been placed on the sidewalk under his window. A subsequent search disclosed conclusively that thieves had been through his house by way of the window, after he locked up the night before. A man being discovered soon after with the stolen goods was charged with burglary. Though there was no direct evidence that the crime was committed in the "night," the court thought that these facts were enough upon which to favor a finding that it was. *State v. McDonald*, 78 N. C. 846.

4. *And in a dwelling-house.* The rules as to this requisite are substantially the same as in the crime of arson — a kindred offense against the security of the habitation. See *ante*, p. 280.

5. *And with intent to commit a felony therein.* A man may break and enter at night a dwelling-house, but unless his intention was to commit some felony there, the fifth requisite of the crime is not present, and he is not guilty of anything more than a trespass. To steal is perhaps the intention entertained most commonly by your burglar; yet in some reported cases the intent has been to kill or to commit a rape. All these are felonies, and make the crime burglary. But if the crime entertained be not a felony then there is no burglary. George Cooper of Vermont was indicted for burglary in breaking and entering a neighbor's house in the night time with intent to commit adultery there. The court said that was nonsense, as adultery was not a felony. *State v. Cooper*, 16 Vt. 551.

If the party actually committed a felony in the house this is overwhelming evidence that this was his intent when he went in. But in a very large number of cases the felony may not be committed and then the intention has to be arrived at from the circumstances. A man in Georgia between twelve and one o'clock at night raised the back window sash of a room in which the party living in the house and his wife were sleeping. He propped up the sash with a stick, and crept into the room. He made a noise in getting in which awoke the owner, whereupon he decamped. There were money and clothing in the room. The Supreme Court thought that there was evidence here from which the inference would arise that the man went into the room intending to steal. *Woodward v. State*. 54 Ga. 106.

As in other crimes it is no defence that the attempt to commit the felony was impossible from the start or was frustrated. See *ante*, p. 66.

And as intent is requisite, the fact that the man found in the house was too drunk to form a burglarious intent is relevant. See *ante*, p. 20.

BREAKING AND ENTERING—CONSTRUCTIVE BREAKING.

DUCHIER v. STATE.

[18 Ohio, 308.]

Sarah Bowen and her son John lived together in the country. One night they were awakened by some one knocking at the door. The latchstring always hung out in those days, day and night, so John called, "Come in." The voice outside answered that the string would not work, wherefore John got up, opened the door, and two men walked into the house. They demanded money, and made the old lady unlock a chest where she kept her small savings, and hand it over to them. They then left.

They were pursued, however, captured, and indicted for burglary. On the trial their counsel contended that as the door had been opened for them, there had been no "breaking" as required in burglary.

The court was of opinion, however, that this was a constructive breaking and was just as complete as an actual one. "Whether," said the judge, "the offender gain an entrance by open violence or by deceiving the inmates and knocking at the door after the manner of a peaceable citizen, if the intent be felonious, the law implies a forcible breaking of the barriers erected for the security of the dwelling."

"Forages," it was said in the principal case, "it has been considered that the most dangerous sort of burglars were those who

would seek to gain an entrance into one's mansion not by violence, for that might be resisted, but by art, cunning and circumvention." This being so it is not singular that the law soon shut this loophole in the definition of burglary, by establishing what it calls constructive breaking.

In a recent Philadelphia case, two men named Johnston and Rolland, with some confederates, had evolved a scheme to rob a bank. They made their preparations very carefully; masks and gowns for disguise, horses for flight, pistols and bludgeons for attack and defense. The cashier lived in the bank and the conspirators determined to do the robbing at night, and to get into the bank by strategy. Rolland ingratiated himself into the confidence of the cashier, and even was invited to dine with him. On the night set for the robbery Rolland rang the door-bell (the door was always kept double locked, except when opened to receive visitors), and was admitted, saying that he had brought a friend who wished to transact business with the bank the next day, for the purpose of introducing him to the cashier. On this story the two were admitted. The friend was Johnston and when the two got inside they attacked the cashier, for the purpose of obtaining the keys of the vaults. The cashier, however, made a stubborn and unexpected resistance, "probably unlooked for," remarked the court, "in view of the disposition of the modern cashier to hand over the keys upon demand," and the robbers were repulsed and afterwards captured. They were convicted of burglary. "When a person," said Parson, J., "rings the door bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner and constitutes a constructive breaking." *Johnston v. Com.*, 85 Pa. St. 54.

FALSE PRETENSES.**PEOPLE v. JOHNSON.**

[12 Johns. 292.]

"Good morning, sir," said the bootmaker, "what can I do for you this morning?"

"I want a pair of shoes."

"Ah, here you are, the very thing."

"These will do. My name is Johnson, and I am working for Jacob Tier, down by the river; he sent me here to get a pair of shoes and you are to charge them to him. You know Mr. Tier, I suppose?"

"Very well, indeed; he is one of my best customers. That is all right. Shall I wrap them up?"

"No, thank you, I will wear them. Good morning."

Ten or twelve days after this dialogue took place, the boot-maker sent the bill for the shoes to Jacob Tier, only to find out that Tier had never authorized Johnson to get the shoes, nor had he such a man in his employ at the time.

Johnson was apprehended and found guilty of false pretenses. "The term *false pretenses* in the statute," said Thompson, C. J., "extends to every case where a party has obtained money or goods by falsely representing himself to be in a situation in which he is not, or by falsely representing any occurrence that had not happened to which persons of ordinary caution might give credit. The ingredients of the offense are obtaining the goods by false pretenses, and with an

intent to defraud. In this case there was a false pretense, and one, too, very naturally calculated to deceive and impose upon the seller, and that pretense was false. * * * That the credit in this case was obtained by means of the false pretense cannot be doubted."

To defraud one of his property by lies and false assertions was not, at common law, an indictable offense—unless, as we have seen, it was accompanied by some token or device of such a character as would be likely to deceive the public at large. *Rex v. Wheatley*, *ante*, p. 30, and notes. To curtail as far as possible these private frauds, the Legislatures of the different States have adopted the provisions of an English statute passed in the reign of George II., by which it was enacted that the obtaining money, goods, wares, or merchandise by false pretenses with intent to defraud any person was indictable. Under these statutes to constitute the offense it must be proved that the pretense is false; that there was an intent to defraud; that an actual fraud was committed; that the false pretense was made for the purpose of perpetrating the fraud and that it was accomplished by these means. *May Cr. L.*, sect. 107.

False pretenses lies very near the domain of larceny. The distinction is this: In *larceny* the owner of the property has no intention of parting with the property to the person taking it, though he may intend to part with the possession. In *false pretenses* the owner intends to part with both property and possession. For example: A. intrusts B. with a parcel to carry to C. D. meets B. on the way and tells him that he is C., whereupon B. gives him the parcel. If B. had authority to pass the property this will be false pretenses; if he had not, it will be larceny. An Ohio granger, just as he was taking the train at Cincinnati for home, was approached by a couple of swindlers, one of whom pretended that he had only gold in his pocket which was at a premium, and that he did not want to pay his freight bill with that. "Let me have," he said to the granger, "\$280 in currency and I will give you this gold to hold as security till I go up to the bank and draw some money, when I will pay you back." The verdant countryman handed over the money, and received the gold pieces, which turned out when examined in the light to be pieces of brass. This was held to be false pretenses and not larceny, because the granger intended to part with

his money and to be paid back in other money to be drawn from the bank by the swindler. *Kellogg v. State*, 26 Ohio St. 15.

The pretense must be of an existing or past fact; if it is of some future event it is not a "false pretense" within the law. A man got \$50 from another on the ground that he was going to pay his rent with it, while he intended nothing of the kind, and the lender would not have let him have the money but for this representation. But it was held that this was not within the statute, as it was not a pretense of any existing fact. *R. v. Lee*, 9 Cox, 804. Two men in Kentucky told old Phoebe Maygular that if she would let them take her cow to market and sell it, they would pay her what it brought and make her a present besides. The old lady agreed; they took the cow, sold it, and put the money in their pockets. Yet they were not guilty of false pretenses. "The statements made by them," said the court, "are mere promises on their part to do and to perform future acts, and in no wise relate to any pretended, existing fact." *Glacken v. Com.*, 3 Met. 238. But the distinction between a future and an existing fact is sometimes very fine. A German read in a newspaper the advertisement of one Ranney for clerks. He replied in person, and was told by Ranney that he would get him a situation at \$50 a month and board if the German would deposit \$100 as security. The German handed over the \$100, but Ranney never gave him the situation. *Ranney v. People*, 22 N. Y. 413. Several years before John Parker kept an intelligence office in Boston, and Cyrus Snell, wanting a situation as a clerk, applied to him. Parker told him that a grocer near by wanted a clerk, and had authorized him to engage one, and that on payment of \$2 he might have the situation. Snell paid the money, but got nothing; there was no grocer of the kind just then in Boston. *Com. v. Parker*. Thatch Cr. Cas. 24. It was held that Parker was, and Ranney was not, guilty of false pretense. "I can get you a situation," was a future event, while "I have a situation for you," was a present one. It is on this ground that a man who buys a thing on credit without any intention of paying for it is not guilty of a "false pretense" within the law.

Exaggeration will not suffice to make a false pretense — as where a person actually in business represents that he has a large and flourishing one, and obtains money on the faith thereof, while in truth he has but a small and crippled business. *Reg. v. Williamson*, 1 Cox, 328. But when Mr. Crab obtained a large sum of money, by representing that he had a large business as an auctioneer and house agent, when he was not in any business at all, this was held a false pretense.

"This was not," said Smith, J., "a question of the degree of business carried on by the prisoner, for the jury found that he was not carrying on business at all as an auctioneer or house agent." *Reg. v. Crab*, 11 Cox, 85. In the sale of goods an assertion by the seller that they are worth more, or are of a better quality than he knows they are, is not a "false pretense." "It seems to me," said Lord Campbell, in a leading case, "that it never could have been the intention of the Legislature to make it an indictable offense for the seller to exaggerate the quality of the goods he was selling any more than it would be an indictable offense for the purchaser during the bargain to depreciate their quality, and to say that they were not equal to what they really were, and so to induce the seller to part with the goods at a lower price." *Queen v. Bryan*, 26 L. J. (M. C.) 84. Or a man selling land, knowing there is a defect in the title, but giving a covenant of good title, is not committing a crime; but is liable simply to a civil action. *Rex v. Codrington*, 1 C. & P. 661. But if, in selling goods, the false representation is as to quantity or weight, the rule is different, and he is guilty of a "false pretense." *R. v. Ridgway*, 3 F. & F. 838.

And the false pretense must be of such a character as is calculated to deceive a man of ordinary intelligence and prudence. But then no standard of prudence can be laid down by the law; each case must be judged by the position and character of the person on whom the fraud was perpetrated. "Thus a child," it has been said, "intrusted with a watch, money or other valuable to be borne to an artificer, merchant, or friend may be induced by the most flimsy and self-apparent falsehoods to part with it; still if the representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however, absurd such representations might seem to the more matured and experienced, yet it would be such false pretenses by one person to another as deprived that other of his personal property, as contemplated by the letter and the spirit of the law. A man of the country unacquainted with the vices incident to a city may be and often is cheated out of his effects by tricks and means that would not for a minute deceive him who was accustomed to the society in which such things so frequently occur. * * * It must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and condition of life of the person practiced upon." *Bowen v. State*, 9 Baxt. 45. It is not required that he should exercise more caution and prudence than nature has given him. But a man who is not a fool must not make a fool of himself.

in the transaction. The case which goes perhaps further than any other in requiring prudence of the swindlee is *Com. v. Grady*, 18 Bush, 285; 26 Am. Rep. 192. Here a man falsely represented that he owned a house and lot free from incumbrances, and procured a loan of money on the strength of this story. As a matter of fact there was a mortgage for its value on record. The court held that he was not indictable because the lender had the means of detection at hand by a visit to the clerk's office.

And where a party, even by a false pretense, obtains money due him from a debtor, this is not criminal. "A false representation by which a man may be cheated into his duty is not within the statute." *People v. Thomas*, 8 Hill, 169.

LARCENY—TAKING AND CARRYING AWAY.

STATE v. GAZELL.

[80 Mo. 92.]

A horse was feeding in a lot surrounded by a fence. He was a good horse, and the eyes of a passer-by turning that way coveted him. As no one seemed to be watching, the passer-by got over the fence, and, putting a rope around his neck, was in the act of leading the horse away, when the owner appeared and led *him* away. Indicted for larceny, his lawyer argued that the horse had not been "taken away," which was a necessary element of larceny; that he had not been removed from the lot, which was surrounded by a high fence.

But the court said that any taking, however insignificant, was enough. "The least removal of the thing taken from the place where it was before is a sufficient asportation, though it be not quite carried off. As where one takes a horse, and is arrested in the act of leading him from the enclosure of the

owner, or where one takes goods in an inn, and carries them into the hall with an intent to steal them, and is apprehended before he gets out of the house, he was adjudged guilty of larceny. So, where one takes plate from a chest and lays it on the floor, and is surprised before he can carry it away, or removes goods from one end of a wagon to the other, but is detected before he gets them out, the offense is complete, and he is guilty of larceny.'

Larceny is the willful and wrongful taking possession of the goods of another with intent to deprive the owner of his property in them.

At common law, larceny was called *petit* when the value of the property stolen did not exceed twelve pence, and *grand* when the value exceeded that sum. Grand larceny was a hanging matter, while petit larceny was punished by fine or imprisonment. In the United States the distinction is still maintained, though the value necessary to render the crime *grand* has been raised. [It ranges from four to thirty-five dollars in the different States.]

This crime will be considered in these divisions, viz.: I. The subjects of larceny. II. The wrongful taking possession III. The requisite intent.

I. *The subjects of larceny.* Personal property is the only kind of property which at common law can be the subject of larceny. Things real, as lands and houses; and things attached or belonging to the realty, as trees, grass, the stones or lead of a house; also title deeds or other writings relating to real estate, can not. But things severed from the land,—as mown grass or pulled or plucked vegetables,—might be stolen and the party would be guilty of larceny. Animals *feræ naturæ*,—i.e., wild animals,—and things not the subject of property at all,—as, for example, a corpse,—were also excluded. But if the animal had been killed for food, or to be stuffed and exhibited, then it was larceny to appropriate it.

II. *The wrongful taking possession.* The taking is either *actual* or *constructive*; the former, when the thief takes the goods directly out of the man's possession; the latter, where the owner delivers

the goods to him; but either does not divest himself of the legal possession, or their legal possession is obtained from him by fraud, in pursuance of a previous intent to steal them. The law of constructive delivery is considered under five heads:—

(a.) *When the property as well as the possession is parted with by the delivery.* Here there can be no larceny, no matter how fraudulent are the means by which the delivery of the property has been procured. If the property has once passed, no subsequent act of the person in whom the right of property has vested can be construed into larceny, whatever the intent of that person may be. Thus, A. buys a horse from B., mounts it, saying he will return immediately and pay. B. says: "Very well." A. rides away and never returns. There is no larceny, because the property as well as the possession is parted with. Harris Cr. L. 168. But in a number of cases of this kind the party would be criminally liable for false pretences. For examples of this, see *ante*, p. 298.

(b.) *When the possession is obtained by fraud, but the owner does not intend to part with the property, though he does with the temporary possession.* This is larceny, though there be a delivery in fact. A. for example goes to B.'s shop and says that C. wants some shawls to look at. B. gives A. some shawls for C. to select from. A. converts them to her own use. This is larceny in A. because until the selection is made, only the possession and not the property is parted with.

(c.) *When the possession is obtained bona fide, and the fraudulent intention is afterwards formed.* If a person obtains in a bona fide manner the possession of another's goods, and afterwards appropriates them, he is not guilty of larceny. Thus a common carrier at common law was not guilty of larceny if he stole the goods entrusted to him, unless he broke the bulk. This has been altered by statute; and the statutory crime of embezzlement (*post*, p. 304) now takes hold of transactions of this kind.

(d.) *When the delivery does not alter the possession.* The taking, to be larceny, must be out of the possession of the owner, or some person entitled to it. But, though a thing may be delivered by the owner to another, he may not part with the possession of it; he may simply put it in charge of that other for a time. And "charge" is not possession. A man who tells his servant to hold

his horse for him, or who allows his guest to use his cups to drink out of and his forks to eat with, retains his control over the horse and the cup and fork as much as if he held the bridle or the cup and fork in his own hand. An old lady who wanted to take the train at a railroad depot, finding a crowd at the ticket office, handed a man in the line a gold coin with a request that he would be good enough, if he pleased, to buy her a ticket to York. The man took the coin, and instead of buying the ticket slipped through the crowd and decamped. It was held that he was guilty of larceny as the old lady had never parted with the possession of the coin in point of law. "She," said the court, "handed it to him to procure her a ticket, never intending to part with the dominion, and merely used his hand instead of her own." *Reg. v. Thompson*, 32 L. J. (M. C.) 58. On the other hand, where the property is delivered to the servant for the master, and the servant immediately converts it to his own use, this is not larceny, for the master never had the possession. A clerk, for example, receives money from one of his master's customers, which, instead of putting in the till, he transfers to his pocket. This is not larceny; but is embezzlement. *Post*, p. 304.

There must be a *taking*, i.e., the goods or property must be moved from the place where it was; there must be a carrying away—called in the law an *asportation*. The slightest removal, however, is sufficient; the possession by the prisoner need only be for an instant. Mr. Bull, who was a collector for a bank, and, therefore, the very kind of a man for a thief to meet, got in a street car one afternoon. In his breast pocket he had a wallet with no less than \$25,000 in notes and securities inside. A man named Harrison standing on the platform, as Mr. Bull passed him, put his hand in his pocket, seized the wallet and had lifted it a couple of inches from the bottom of the pocket when Mr. Bull felt him, and got it out of his hand. It was held that there had been a sufficient taking, the judge quoting a remark of an English Baron, that though there must be a removal of the property, yet a hair's breadth will do. "The hand of the prisoner," said the court, "was about the book, controlling it and taking it away; indeed, had taken it away, every part of it from the space which that part had occupied before his touch. It was in his possession. He directed, and for the instant of time controlled its movements. No inanimate physical hindered him. Bull for that instant of time did not control or possess it." *Harrison v. People*, 50 N. Y. 518.

III. *The requisite intent.* The taking must be willful; if it is under color of right, though the supposed right has no foundation, it is not larceny. *State v. Homes*, 17 Mo. 379. If it is not taken with the intent formed at the time to steal it, it is not larceny. Thus, if I take my neighbor's horse out of his stable and ride it in open day for a few miles, where everybody knows me and it, this would be a trespass, if done without his consent, but it would not be larceny.

And the taking must be secret; if it is open and by force the crime is robbery. *State v. Ledford*, 67 N. C. 60.

Likewise, the taking must be for gain — *lucri causa* as the nomenclature of the law has it. Mr. Orin Woodward who was on bad terms, on account of some litigation between them, with Ambrose Jewell, finding his stable door open one afternoon, led his best horse out, took it to a common, killed, and buried it. Mr. Orin Woodward was tried for larceny and acquitted, because it was clear he took the horse for revenge, not for greed. *People v. Woodward*, 31 Hun, 57. But the least gain is sufficient. Thus, where the prisoner, a servant of A., applied for and received at the post-office all A.'s letters, and delivered them to A. with the exception of one, which the prisoner destroyed, in the hope of suppressing inquiries respecting her character, it was held to be a larceny; "for supposing that it was a necessary ingredient in that crime, that it should be done *lucri causa* (which is not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character." *Queen v. Jones*, 1 Den. C. C. 180. In another case some servants in husbandry, having the care of their master's team, entered his granary by means of a false key, and took out of it two bushels of beans, which they gave to his horses. Of eleven judges, three were of opinion that there was no larceny; while the eight judges who were for conviction, alleged that by the better feeding of the horses, the men's labor was lessened, so that they took the beans to give themselves ease — which was constructively, at least, *lucri causa*. *Rex v. Morfit*, Rus. & Ry. 307. And in still another case where a party named Cabbage, having forced open a stable door, took out a horse, led it about a mile to an old coal pit, and there backed it down and killed it, his object being that the horse might not contribute to furnish evidence against one who was under a charge for stealing it, a majority of the court thought him guilty of larceny, the object of protecting his friend by the destruction of the animal being a benefit or *lucr* *causa*. *Rex v. Cabbage*, Rus. & Ry. 292.

Robbery is the taking by force or fear of the property of another against his will. It differs from larceny in having the element of force or fear. The rules as to larceny, given in the last cases (*ante*, pp. 299-302) generally apply with the exception of the fact of force or fear.

1. *There must be force used.* No sudden taking of things unawares from the person, even though it be done with force, as by snatching a thing from a man's hand or out of his pocket, is sufficient to constitute robbery. There must be some injury done to the person or clothing, or some struggle for the possession of the thing. But a very little will do. Mr. Boardman was walking home one night from a house, when he met a man who seized his watch, and exclaiming, "Damn you, I will have your watch," ran away with it. In taking the watch the guard was broken — a ribbon which went around Mr. Boardman's neck. It was held that this was robbery and not larceny from the person. "The expressed determination at the time of the felonious intent, accompanied by the degree of force necessary to carry that intent into effect, makes this a clear case of a taking by open violence as distinguished from a secret taking or a mere snatching from the hand of another." *State v. McCune*, 5 R. I. 60. Mrs. Hobart had an even worse experience. Coming out of the opera-house one night she felt a sudden pain in the ear and saw a man snatching her diamond ear-ring away. The ear-ring, however, fell into her hair where it was found when she got home; her ear was torn very badly and bled very much. This was held sufficient violence to constitute robbery. *R. v. Lapier*, 2 East P. C. 557.

2. *Or there must be fear produced.* Fear of personal injury is enough. But while this fear is not confined by the law to an apprehension of bodily injury, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror. It is not necessary that the danger should be impending on the person robbed; it may be on those dear to him, as his children; or on his house. *Harris*, Cr. L. 177. But the fear induced by a threat to injure one's character or business prospects is not enough.

The fear or violence must take place at the time or before the property is taken — if it be after it will not constitute robbery.

"Harman being on horseback, desired Halfpenny to open a gap for him, and while he was so doing Harman took the opportunity unperceived to pick his pocket of his purse. Halfpenny turning round and seeing the purse in Harman's hand, demanded it of him, who then menaced Halfpenny and went away with the purse. On an indictment for robbery the prisoner was held guilty of simple larceny only, the property being obtained by stealth and not by violence or putting in fear, the words of menace being used after the taking." Harman's Case, 2 East P. C. 736.

The taking may be either from the person of the victim or in his presence. "It need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one having first assaulted another takes away his horse standing by him or having put him in fear drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat, which had fallen from his head." 2 East, P. C. 707.

Embezzlement is not a common-law offense. The doctrine of the common law was that a fraudulent breach of trust is not a crime — a conclusion based on the sentiment that against open violence people ought to be protected by law, but that they could protect themselves against breaches of trust by not trusting people — a much easier matter, as has been remarked, in simple times when commerce was in its infancy, than now. Steph. His. Cr. L. 151. Another reason why a breach of trust was not made a crime lay in the fact that imprisonment for debt was then in vogue, and if the party did not pay up the money he had converted, he could be put in jail indefinitely or until he did pay.

After a while, however, statutes to supply this defect in the law began to be passed. In the twenty-first year of the reign of that king of many wives, the eighth Henry, it was made a crime in any servant to embezzle money or chattels intrusted to him by his master. Years later Mr. Bazeley's Case caused another statute. Bazeley was a clerk in a bank, who, on receiving a note for £100, which it was his duty to put to the creditor of the customer who paid it in, applied it to his own use. The judges held this no crime, for Bazeley was not a "servant" within the statute of Henry, nor had the money been intrusted to him by his "master." Leach Cr. L. 835. So Parliament enacted that any clerk or servant who should, by virtue of his employment, receive any money, chattel or valuable thing for his master, and should embezzle the same should be punished, although the thing was not received into

the master's possession otherwise than by the possession of the offender. This statute has been since extended to cover embezzlement by bankers, merchants, brokers, agents, attorneys, trustees, or directors and officers of corporations; and the English legislation has been substantially copied in the United States.

*LARCENY—FINDER OF LOST PROPERTY.***REGINA v. THURBORN.**

[1 Den. C. C. 387; 2 Lead. Cr. Cas. 409.]

Samuel Thurborn, one morning in the spring of the year 1849, walked along the highway with his eyes on the ground. Straight in front of him Samuel espied a bank-note, which bank-note, he being short of cash at the time, Samuel picked up and pocketed in quick order. Who had lost it did not trouble him at all, for "finders is keepers" reasoned Samuel. The next day, while it still lay in his pocket, a friend communicated to Samuel the mournful intelligence that it had been lost by John Brown, who was engaged in a fruitless search for it. Straightway Samuel went to a tavern and changed it for silver, and straightway John Brown, hearing of what had become of his bank-note, had Samuel arrested for larceny.

But all the judges said "not guilty." The rule of law on this subject, quoth they, is that if a man finds goods that have been actually lost or are reasonably supposed by him to have been lost, and appropriates them with the intent to take the entire dominion over them, really believing at the time that the owner can not be found, it is not larceny. But if he take them with the same intent, though lost or reasonably sup-

posed to be lost, but reasonably believing that the owner can be found, it is larceny.

And the judges added that the fact that Samuel found out who the owner was before he changed the note did not make any difference — his *original intent* was not to steal, for he did not know who the owner was.

A finder of a lost article may or may not be guilty of larceny. He will in fact *not* be guilty unless it is shown, 1st, that at the time of finding it he had a felonious intention of appropriating it, and 2d, that at the time of finding it he had reasonable grounds for knowing who the owner was or how to discover him.

1. *The finder must at the time of finding have the felonious intention of appropriating the article.* An intention subsequently formed is not enough. A crowd of people were in a tent at an exhibition of wild animals. Ropes separated the place where the spectators were from the cages. Leaning on the ropes gazing at the lions and tigers was Mr. Roper. Somebody called out: "There is a shawl," and Mr. Roper glancing down saw at his feet a woman's shawl which had evidently been dropped by some female in the crush. Mr. Roper stooped down, picked it up, and brushing off the dirt which was on it hung it over the ropes in full view of the audience. After a while seeing that the shawl was a good one and would look very well on his wife, he slid it under his coat and walked off. The owner afterwards turned up and Mr. Roper was indicted for larceny. But it was held that he was not guilty, because when he picked it up he had clearly no intention of appropriating it — else he would not have hung it up in view of the spectators — and his subsequent intention when he put it under his coat, could not relate back to the time of finding. *State v. Roper*, 8 Dev. (L.) 478; 24 Am. Dec. 268.

2. *The finder at the time of the finding must either know the owner or have reason to believe he can be found.* A man finding goods and knowing the owner of them, who converts them to his own use instead of returning them, is guilty of larceny — as if I find on the street a pocket-book, with the owner's name on it, containing money. *State v. Weston*, 9 Conn. 527. But if his name is not on it, and there is nothing to indicate who he is, I am not obliged to advertise for him or hunt him up. However, if a servant were to

find a roll of money in his master's house, or a person were to find a jewel in another's garden, here the finder would be held to have reasonable grounds for knowing the owner, or that he could be found, and it would be his duty to inquire of the master or the neighbor as the case may be. But if, when the property is found, the finder does not know or have any reason to know who the owner is, his subsequent knowledge does not make his appropriating the property larceny. *Reg. v. Thurborn* decides this, and a later case illustrates the extent of the rule. A woman going home late at night on a country road dropped a gold piece. It being dark, she did not look for it, but started out early the next morning on a search. But there were earlier birds than she; a man named Glyde, on his way to his work, passed the place and picked up the coin. The woman met Glyde, to whom she related the loss of her coin, but although he had it in his pocket, he denied having seen it. Afterwards, some one coming forward who had seen him pick it up and pocket it, he was indicted for larceny. But all the judges agreed that he could not be convicted, for the reason that at the time he picked up the money, although then intending to keep it, he did not know and had no reason for knowing who the owner was. *Reg. v. Glyde*, L. R. 1 C. C. R. 139.

But *mislaid property* is not lost property; and is not within the above rules as to lost property. A purchaser in a store left his purse on the counter. A female customer standing by had her attention called to it, and picked it up and put it in her pocket as though it were her own. Though she did not know the owner, it was held that she was guilty of larceny. "In this case," said the court, "there is no reason for supposing that the property was lost at all or that the prisoner thought it was lost. On the contrary, the owner, having left it at the stall, would naturally return there for it when he missed it. There is a clear distinction between property lost and property merely mislaid, put down and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding, therefore, does not arise." *Reg. v. West, Dears.* 402. A man went into a barber shop in Lebanon, Tennessee, to be shaved. The operation being performed, he took out his pocket-book to pay for it, and while waiting for change laid the wallet on a table in the shop. When the barber handed him the change he walked out without thinking anything about the pocket-book, and it was not

till night that he discovered his loss. But he remembered where he had laid it down, and immediately called at the barber's for it. The barber denied having seen it. It having been shown that the barber had taken it from the table and converted it to his own use, he was held guilty of larceny. "The pocket-book," said the court, "under the circumstances proved was not lost, nor could the defendant be called a finder. The pocket-book was left, not lost. The loss of goods in legal and common intendment depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed chamber or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully or voluntary in the place you intend and then forget it; it is casually and involuntary to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocket-book, therefore, upon a table and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property" *Lawrence v. State*, 1 Humph. 228; 84 Am. Dec. 644.

And the same rule applies to property handed to another by mistake. If one receive from another—the delivery being unintentional and by mistake—a sum of money or other property, the receiver at the time knowing the mistake, yet intending to keep it, he is guilty of larceny. A man presented at a bank a check for \$5 and was paid by mistake by the teller \$50. The man seeing the mistake, but intending to profit by it, pocketed the \$50, and walked off with it. He was held guilty of larceny. *Reg. v. Middleton*, 12 Cox, C. C. 260, 417; 1 Green. Cr. Rep. 4. "The case," said Bovill, C.J., "appears to me to be the same as if the prisoner had left a watch at the watchmaker's to be repaired, and afterwards goes to the watchmaker's where he sees his watch hanging up behind the counter, and another watch of greater value and belonging to another person, hanging beside it, and upon his asking for his watch the shopman by mistake hands him the watch belonging to the other person. He sees his own watch; he knows that the watch handed to him does not belong to him, but is the property of another, and that the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received, and taken away another man's property, would have

been guilty of larceny; and the shopman in such a case, and the clerk in this case, is in the condition of a mere stander-by who without authority and by mere mistake hands to him a chattel which he sees before him." And see *Wolfstein v. People*, 6 Hun, 121, a similar case.

FORGERY.**COMMONWEALTH v. FOSTER.**

[114 Mass. 311; 19 Am. Rep. 353.]

Mr. Foster got a man named George P. Little, who carried on a one-horse business under the name of Little & Co., to sign the firm name to a note. There was at the same time in the same town a wealthy and responsible firm named Little & Co., and Foster pretending that this was a note of the latter firm had no trouble at all in negotiating it. Fraud as well as murder will out, and it was not long before the trick was discovered, and Mr. Foster was indicted for forgery, and convicted.

Forgery is the fraudulent making or alteration of any document to another's prejudice. It is a species of false pretense, but is much more severely punished than that crime is.

A false making is necessary. This may consist in imitating the signature of another, or signing a fictitious name in order to obtain money on it, or even signing one's own name, if the intent is to pass it off as the signature of another person who bears the same name.

A "document," need not be a written instrument; if it be engraved or printed it is nevertheless the subject of forgery. This was decided in a Massachusetts case, among others, where a man had some railroad tickets printed in imitation of those of the New York Central

Railroad Co., and to defraud the company. "It is objected," said Denny, J., "that the crime of forgery cannot be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by those to be bound. The question is whether the writing, the counterfeiting of which is forgery, may not be wholly made by means of printing or engraving, or must be written by the pen of the party who executes the contract. In the opinion of the court such an instrument may be the subject of forgery when the entire contract, including the signature of the party, has been printed or engraved. The cases of forgery generally are cases of forged handwriting. The course of business and the necessities of greater facilities for dispatch, have introduced, to some extent, the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound." *Com. v. Ray*, 3 Gray, 446. But a painting is not a document. A picture dealer had a copy made of a well known painting by a living master, and put the name of the great artist in the corner, as he usually signed it, so as to deceive purchasers into thinking that it was an original. It was held that this was not forgery. "A forgery," said Chief Justice Cockburn, "must be of some document or writing, and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his." *Reg. v. Closs*, D. & B. 460. For a similar reason Mr. Smith escaped. He painted a number of wrappers in imitation of those in which egg powders made by another manufacturer were enclosed. He filled these with spurious egg powders and sold them. "It might as well be said," said the judge, "that if one tradesman used brown paper for his wrappers and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper." *Reg. v. Smith*, D. & B. 576.

The instrument must on its face prejudice the legal rights or pecuniary interest of the supposed signer, or the person defrauded. Therefore, when Mr. Ames forged a paper purporting to be signed by the selectmen of Sangerville, and addressed "to whom it may concern," recommending Mr. A. as a man of substance and credit, this was held within the definition. *State v. Ames*, 2 Me. 365. But if the instrument is of no legal force, as, for instance, a contract without consideration, or a will not properly witnessed, then falsely making or altering it is not forgery. A man called Water-

man, representing his name as being Wiley, presented this document to the Superintendent of the Chicago, Rock Island and Pacific Railroad at Chicago:—

“THE DELAWARE AND HUDSON CANAL COMPANY,
“ALBANY AND SUSQUEHANNA DEPARTMENT,
“ALBANY, NEW YORK, August 28, 1872.”

“To any Railroad Superintendent:

“The bearer, T. H. Wiley, has been employed on the A. & S. R. R. as brakeman and freight hand. He goes West to find a more lucrative position. Any courtesies shown him will be duly appreciated and reciprocated should opportunity offer.

“H. A. FONDA, *Superintendent.*”

It was held that this was not the subject of forgery. “The writing, if genuine,” said Breese, J., “has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise of no legal obligation to reciprocate them.” *Waterman v. People*, 67 Ill. 91.

The forgery need not be of the whole instrument. Generally the only false statement is the use of a name to which the party is not entitled. It does not matter whether the name wrongly applied be a real or fictitious one. Of course the forgery need not be in the name; it may equally be in any other part of the instrument. For example, it is forgery to fill in without authority a blank check; or to alter the date of an accepted bill, so as to show an earlier day of payment, or to put an address to the name of the drawee of a bill of exchange with intent to make the acceptance appear to be that of a different person, or to tear off a condition whereby a non-negotiable instrument is made negotiable. *Harris Cr. L.* 219.

The alteration, however, must be material, and therefore it is not forgery to add to an instrument words which the law would supply, or to put the name of a witness to a paper which the law does not require to be attested. *State v. Gherkin*, 7 Ired. (L.) 206.

Forcible entry and detainer consists in “violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law.” While a criminal offense, it is more commonly prosecuted in this country as a civil action for a penalty.

Receiving stolen goods, knowing them to be stolen, is a crime, whether the intent is to aid the thief in concealing or escaping

with them, or to appropriate them and sell them. Formerly the receiver could not be convicted until the thief had been, but this is now altered by statute.

Malicious mischief. Every person who willfully or maliciously injures or destroys any real or personal property belonging to another is guilty of malicious mischief. At common law this misdemeanor did not apply to injuries to real estate; now, however, it includes both species of property.

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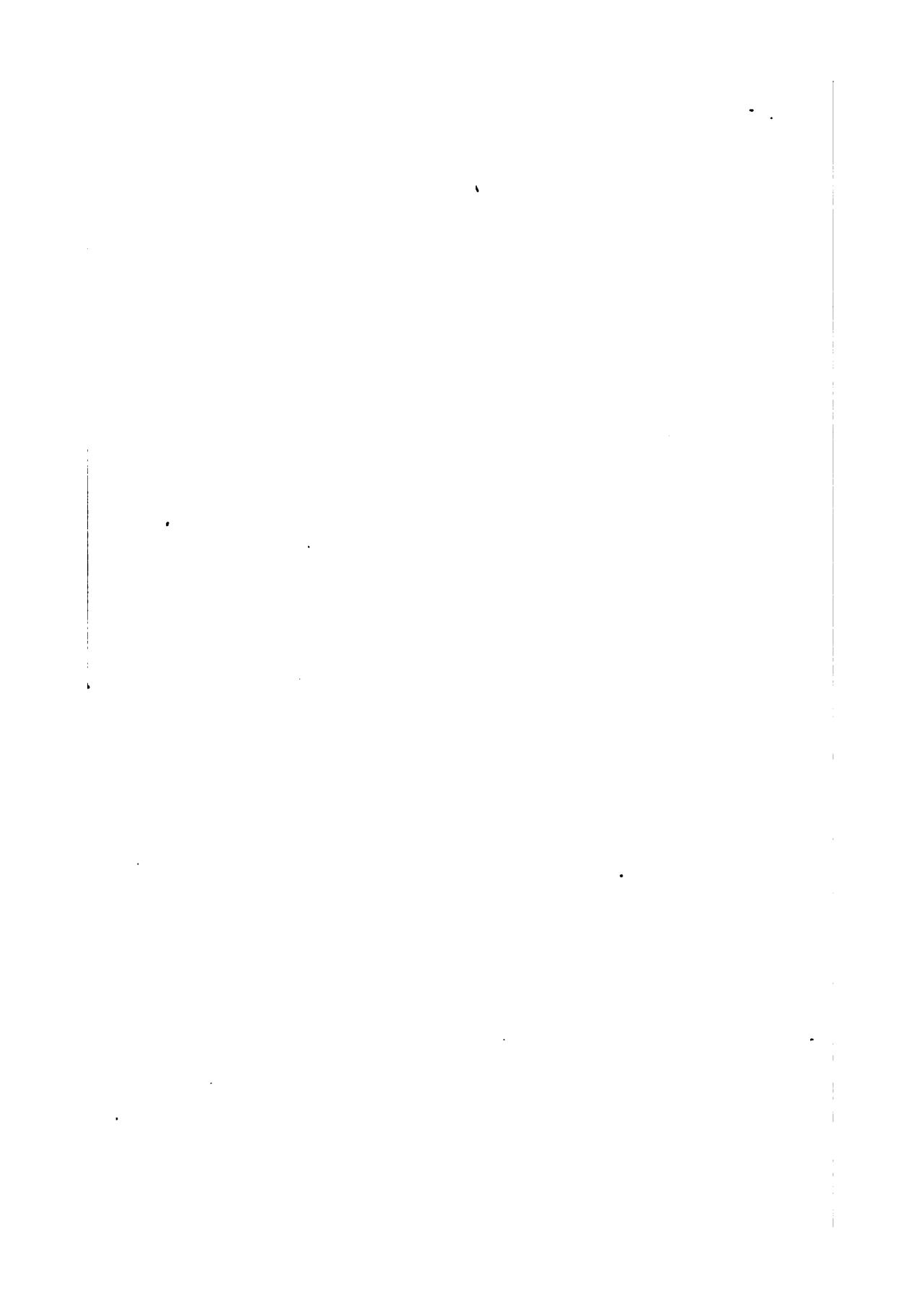
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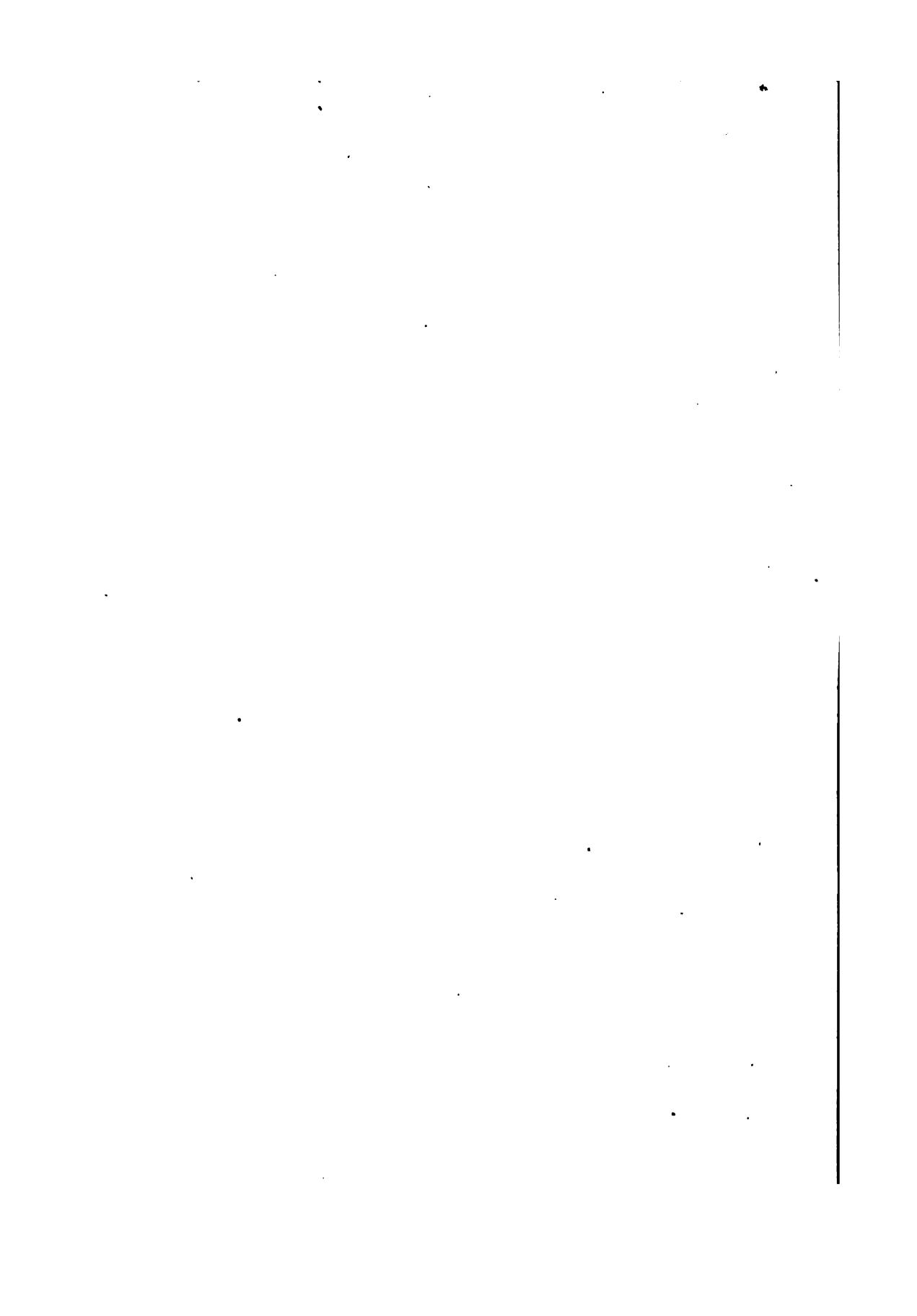
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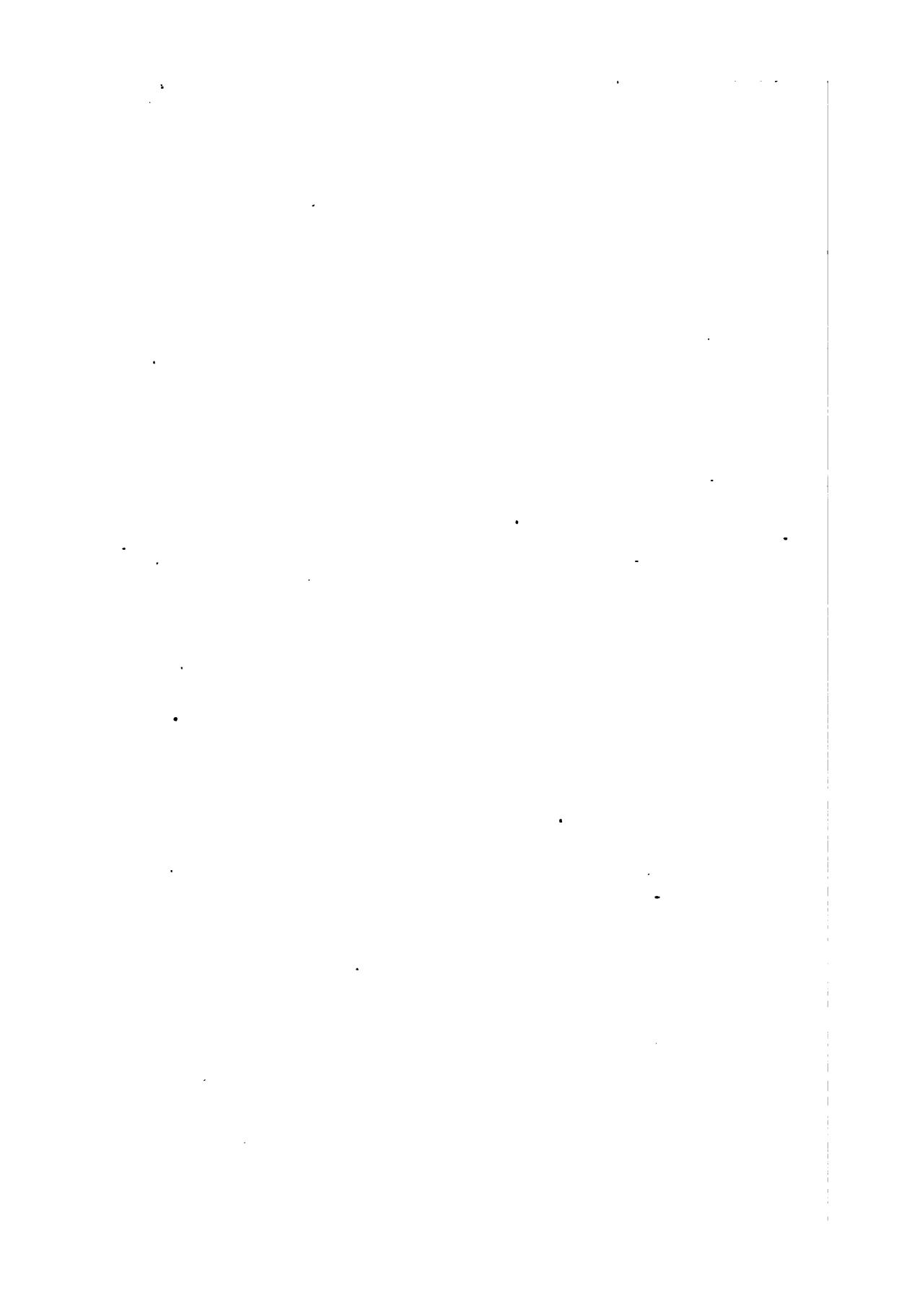
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